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Article

Notes

Recent Development

The failure of a defense attorney to conduct voir dire, make an opening statement, cross-examine the prosecution's witnesses, present defense witnesses, and make a closing statement is not sufficient incompetence for obtaining relief under Post-Conviction Remedy Rule 1, if such failure is due to an attorney's misconception of a single rule of law.—*Bucci v. State,* 332 N.E.2d 94 (Ind. 1975).

Book Review

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The Flammable Fabrics Act and Strict Liability in Tort

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I. INTRODUCTION

Each year in America approximately 3,000 to 5,000 persons die as a result of burns associated with flammable fabrics.[1] Another 150,000 to 200,000 persons are injured.[2] A disproportionate number of the deaths and injuries involve the very young and the very old.[3] The direct economic loss from these fires exceeds one-quarter of a billion dollars,[4] with over 1.5 million workdays lost.[5]

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[1]SECRETARY OF HEALTH, EDUCATION AND WELFARE, FOURTH ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ON THE STUDIES OF DEATHS, INJURIES, AND ECONOMIC LOSSES RESULTING FROM ACCIDENTAL BURNING OF PRODUCTS, FABRICS, OR RELATED MATERIALS vi (1972) [hereinafter cited as HEW FOURTH ANNUAL REPORT]. *Contra,* Daily News Record, Sept. 23, 1975, at 4, col. 4.

> [R]ecently released information from NEISS (National Electronic Injury Surveillance System), . . . indicates that 15,600 persons annually receive medical treatment for textile-related burns; 9,700 involve articles of clothing, including 2,600 specifically in the nightwear area. And according to the National Center for Health Statistics, 517 deaths a year are caused by ignition of clothing.

Richard Simpson, Chairman of the Consumer Product Safety Commission, referred to this information when he said:

> "I personally question whether there is a need for additional governmental regulation, because of the extensive voluntary efforts being made by the industry, and because of the new injury data which has just been presented to us."

Id.

[2]HEW FOURTH ANNUAL REPORT vi. *Contra,* Daily News Record, *supra* note 1.

[3]HEW FOURTH ANNUAL REPORT xi.

[4]*Id.* at vi.

[5]*Hearings on H.R. 5698 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 1st Sess. 1 (1971).

The impact of fabric ignition upon the severity of a burn is well documented.[6] When a person comes in contact with fire and the fabric in his clothing ignites, his chances of dying are higher than if his clothing did not ignite. Also, not only is the mortality rate higher, but the average hospital stay is 56 days where ignition occurs compared with 35 days where it does not occur.[7]

Those who have suffered from fabric ignition have sought redress through the courts under theories of negligence, warranty, and strict liability. Congress, recognizing the severity of the danger of flammable fabrics, promulgated flammability standards under the Flammable Fabrics Act.[8] Defendants in strict liability actions recently have asserted the defense that compliance with federal fabric standards negates the "unreasonably dangerous" or "defects" requirement of section 402A of the *Restatement (Second) of Torts*.[9] This commentary explores the confrontation between the federal standards and plaintiffs' recoveries in strict liabilty under section 402A.

II. The Flammable Fabrics Act

Congress passed the Flammable Fabrics Act[10] in 1953 in response to "a wave of catastrophies [that] swept across the country."[11] The Act was motivated specifically by the large number of burn cases involving "torch" sweaters and flammable children's

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[6]*Hearings on Flammable Fabrics and Other Fire Hazards to Older Americans Before the Senate Special Comm. on Aging*, 92d Cong., 1st Sess. 11 1972). The Secretary of Health, Education, and Welfare reported in 1971:

> The injury severity differences are shocking. *Clothing Ignition* victims were *four times more likely to die* than those spared clothing fire. Twenty-four percent of the *Clothing Ignition* patients died in the hospital. Their burns covered *nearly twice as much body surface,* and *six times more skin was burned full-thickness.* They spent an average of 21 more days from burn to *hospital discharge,* and their medical costs were $5,000 higher than the average *No Clothing Ignition* patient.

Secretary of Health, Education and Welfare, Third Annual Report to the President and the Congress on the Studies of Deaths, Injuries, and Economic Losses Resulting from Accidental Burning of Products, Fabrics, or Related Materials 37 (1971) (emphasis in original). *See also* "Thirty Flame Burn Accident Groups—Rank Order by Size," *infra* p. 417, *from Hearings, supra* at 62.

[7]HEW Third Annual Report, *supra* note 6, at 73.

[8]15 U.S.C. §§ 1191-1204 (1970).

[9]*See, e.g.*, Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973); LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967).

[10]Act of June 30, 1953, ch. 164, § 2, 67 Stat. 112 (codified as amended at 15 U.S.C. §§ 1191-1204 (1970)).

[11]*Hearings on H.R. 389, H.R. 2768, H.R. 3851, H.R. 1459, & H.R. 4500 Before the House Comm. on Interstate and Foreign Commerce*, 83d Cong., 1st Sess. 1 (1953).

playsuits.[12] In an effort to protect the consumer, Congress adopted a flammability standard[13] and provided procedures for the revision of the standard.[14] The Federal Trade Commission was given the responsibility for enforcing the Act.[15]

Even prior to its enactment, the Act was criticized for its narrow scope.[16] One significant shortcoming was that it applied

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[12]H.R. REP. No. 425, 83d Cong., 1st Sess. (1953); S. REP. No. 400, 83d Cong., 1st Sess. (1953), *reprinted in* U.S. CODE CONG. & AD. NEWS 1722, 1723 (1953). *See, e.g.*, Blessington v. McCrory Stores Corp., 198 Misc. 291, 95 N.Y.S.2d 414 (Sup. Ct. 1950), *appeal dismissed*, 279 App. Div. 806, 109 N.Y.S.2d 719, *aff'd mem.*, 110 N.Y.S.2d 456 (1952), *aff'd*, 305 N.Y. 140, 111 N.E.2d 421 (1953) (seven-year-old boy burned to death in a highly flammable cowboy suit); Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944), *aff'd*, 294 N.Y. 680, 60 N.E.2d 839 (1945) (critical burn from "exploding" dress. Sizing of the dress was composed of a particular pyroxylin which also serves as the basis of gunpowder).

[13]Act of June 30, 1953, ch. 164, §§ 3-4, 67 Stat. 111-12. The Act prohibited the sale of certain wearing apparel "so highly flammable as to be dangerous when worn by individuals." *Id.* § 3. Specifically, the Act incorporated Commercial Standard (CS) 191-53 promulgated by the Secretary of Commerce, effective January 30, 1953. *Id.* § 3(a). CS 191-53 classified fabric on the basis of burning time in seconds of a 2-inch by 6-inch specimen under specified procedures. Fabrics with a flame spread of more than 7 seconds were classed as having normal flammability, 4 to 7 seconds as having intermediate flammability, and less than 4 seconds as rapid and intense burning unsuitable for clothing. S. REP. No. 400, 83d Cong., 1st Sess. 6 (1953), *reprinted in* U.S. CODE CONG. & AD. NEWS 1722, 1728 (1953). In 1954, however, because of the apparent restrictiveness of a 4-second flame spread requirement, Congress modified the rapid and intense burning classification of CS 191-53 to fabrics with a flame spread of less than 3.5 seconds. Act of August 23, 1954, ch. 833, 68 Stat. 770. It must be noted that both the original standard of CS 191-53 and the subsequent modification of the flame spread standard were due to industry influence. CS 191-53 was developed by the American Association of Textile Chemists and Colorists and the National Retail Dry Goods Association, with advice from the National Bureau of Standards. NATIONAL COMM'N ON PRODUCT SAFETY, FEDERAL CONSUMER SAFETY LEGISLATION 110 (1970) [hereinafter cited as HEFFRON REPORT]. Further, the subsequent modification of the flame spread standard was directed at preventing 250 million yards of sheer material from being banned. *Id.* at 112. Thus, the standards were so narrowed that, in effect, only the infamous "torch" sweater was covered. The industry influence has been strongly criticized. *See* Comment, *Dressed To Kill—The Flammable Fabrics Act of 1953—Twenty Years in Retrospect*, 4 CUMBER.-SAM. L. REV. 358 (1973); Note, *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance*, 39 GEO. WASH. L. REV. 608, 610-12 (1971).

[14]Act of June 30, 1953, ch. 164, § 4, 67 Stat. 112. If the Secretary of Commerce found the Act's standards inadequate, he was directed to report such findings and recommend remedying proposals to Congress.

[15]*Id.* § 5. If the Federal Trade Commission discovered a violation of the Act, it was empowered to enjoin such violation, or to seize and confiscate materials. Willful violations of the Act subjected the offender to criminal misdemeanor penalties. *Id.* § 7, 67 Stat. 114.

[16]*See* Letter from James M. Mead, Chairman of the Federal Trade Commission, to the Hon. Charles A. Wolverton, Chairman, House Committee on

only to wearing apparel.[17] Consequently, household items, such as rugs, blankets, and draperies, were excluded from the Act while clothing made from the same fabric was included. In fact, the same fiber utilized in the "torch" sweaters, brushed viscose rayon, was sold without restrictions in blankets and other necessary household products.[18] Furthermore, it was questioned whether the test procedures embodied in the Act accounted for normal garment use by the consumer and whether the procedures had been objectively validated.[19]

These limitations in the original Act were remedied by amendments in 1967[20] to "protect the public against undue risk of fire leading to death, injury, or property damage arising out of ignition of articles of wearing apparel and interior household furn-

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Interstate and Foreign Commerce, March 19, 1953, in H. REP. No. 425, 83d Cong., 1st Sess. (1953), *reprinted in* 2 U.S. CODE CONG. & AD. NEWS 1731-34 (1953).

In 1967, President Lyndon Johnson, addressing the problems of coverage and standards validity, said:

> There is one gap, however, in existing legislation which is so glaring that action should not be delayed. The Flammable Fabrics Act of 1953 has done much to keep extremely flammable clothing out of the Nation's stores.
>
> But the standard of flammability established under the Act is deficient. The Act does not cover many articles of clothing which can be consumed by fire almost instantaneously. It is narrowly restricted to certain wearing apparel. It does not extend to such everyday items as baby blankets, drapes, carpets and upholstery fabrics.

Hearings on H.R. 5654, H.R. 5474, H.R. 6142, H.R. 7471, H.R.J. Res. 280, H.R.J. Res. 340 & H.R.J. Res. 357 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 27 (1967) [hereinafter cited at *1967 House Hearings*].

[17]15 U.S.C. § 1191 (1964), *as amended* 15 U.S.C. § 1191 (1970).

[18]113 CONG. REC. 2037-38 (Feb. 16, 1967) (remarks of Senator Magnuson during the Senate debate on the 1967 amendments to the Act); *1967 House Hearings, supra* note 16, at 15.

[19]Letter of James M. Mead, *supra* note 16, at 1733. Mr. Mead noted that CS 191-53 required the test specimen to be dry-cleaned and washed prior to testing. The experience of the FTC in the "torch" cases, however, was that the fires occurred prior to laundering. Further, Mr. Mead remarked that although CS 191-53 was promulgated by the Secretary of Commerce, that did not constitute a ruling or finding by the Secretary or the National Bureau of Standards that the standard was adequate from the standpoint of the public.

[20]Act of December 14, 1967, Pub. L. No. 90-189, §§ 1-10, 81 Stat. 568-74, *amending* 15 U.S.C. §§ 1191 *et seq.* (1964) (codified at 15 U.S.C. §§ 1191 *et seq.* (1970)). Although no substantive change occurred until 1967, the FTC attempted in 1963 to bring baby blankets within the purview of the Act. The Commission ultimately decided, however, that blankets were not wearing apparel and thus were not covered. HEFFRON REPORT 113. *See* Elman, *Administrative Reform of the Federal Trade Commission,* 59 GEO. L.J. 777, 790-91 (1971).

ishings."[21] The amendments broadened the Act's coverage to include articles not previously covered, such as hats, gloves, and interior furnishings.[22] Further, the section that gave Congress the exclusive power to enact standards was limited by giving the Secretary of Commerce the power to promulgate standards, thus avoiding the cumbersome congressional enactment requirement of the 1953 version.[23] The Secretary of Health, Education, and Welfare was given a statistical reporting function,[24] and a preemption clause was added.[25]

Despite these amendments, however, the Act continued to be of dubious value. Although the flexibility of the rule promulgation procedure was enhanced, built-in mechanisms of delay served to blunt the effectiveness of the new procedure.[26] Further, the continuing absence of pre-market testing procedures severely reduced

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[21]H.R. REP. No. 972, 90th Cong., 1st Sess. 6 (1967).

[22]15 U.S.C. §§ 1191(d)-(e) (1970).

[23]*Id.* § 1193.

[24]*Id.* § 1201.

[25]*Id.* § 1203.

[26]Delay in rule promulgation was an inherent manifestation of the exhaustive procedural requirements. Prior to issuance of any new standard, the Department of Commerce was required to publish notice that a standard might be needed, followed by a 30-day investigatory period during which interested parties could comment. This was followed by a notice of the proposed standard with further invitation for comment. During either proceeding an interested party was guaranteed an oral hearing on request. Prior to publishing a decision on the proposed standard, the Secretary was required to consult with a National Advisory Commission for 15 days. Subsequent to final publication, any person adversely affected had 60 days to petition for judicial review. Finally, after all of these proceedings, the Act delayed the effective date of the standard for one year after final publication. NATIONAL COMM'N ON PRODUCT SAFETY, FINAL REPORT 93-94 (1970). The Department of Commerce argued that these steps were appropriate and that the delay resulted from development of an adequate technical basis and methods for testing. *Hearings on H.R. 5698 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 1st Sess. 15-16 (1971). However, the National Commission on Product Safety found:

> This procedure goes beyond the Administrative Procedure Act . . . beyond the Flammable Fabrics Act itself, and certainly beyond the need to assure procedural integrity. . . .
>
> This lengthy process is at least in part responsible for the fact that the first partial flammable fabric standard was not issued by the Department of Commerce until April, 1970, even though the expanded authority was granted in December, 1967.

FINAL REPORT, *supra* at 94. *See* HEFFRON REPORT 133; Note, *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance,* 39 GEO. WASH. L. REV. 608, 612-13 (1971).

The rulemaking procedure established by the Consumer Product Safety Commission does not differ significantly from the Department of Commerce procedure. *See* 16 C.F.R. §§ 1607.1 to .14 (1975).

the FTC's ability to limit distribution of offending materials.[27] These inadequacies prompted Casper Weinberger, then Chairman of the FTC, to remark:

> In sum, nowhere in the existing machinery is there an effective means of accomplishing the primary objectives of the act—detecting flammable fabrics before they are placed on the market and effectively deterring the future sales of flammable fabrics by the threat of meaningful criminal and civil sanctions.[28]

In support of Mr. Weinberger's conclusions, the FTC statistical reports required by the Act revealed that no significant reduction in death and injuries due to flammable fabrics had been achieved.[29]

Although the Department of Commerce was slow to initiate new standards between 1967 and 1970, it began to take a more forceful role in 1970. Between 1970 and 1973, the Department's actions included proposing flammability standards for blankets[30] and promulgating standards for carpets,[31] mattresses,[32] and children's sleepwear.[33] The Department had only three years to rectify its seventeen years of relative inactivity. In 1973, the Department's role under the Act was transferred to the Consumer Product Safety Commission.[34] Since assuming its role under the

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[27] *Hearings on H.R. 5698 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 15 (1971).

[28] *Id.* The Department of Commerce proposed self-regulation by the manufacturer, with a certification of compliance made to the FTC. *Id.*

[29] HEW FOURTH ANNUAL REPORT, *supra* note 1, at vi.

> Data accumulated during the present reporting period—May 1971 through June 1972—do not indicate any significant change in estimates of the flammable fabrics problem contained in the three previous reports. These estimates are that there are annually 3,000 to 5,000 deaths and 150,000 to 250,000 injuries from burns associated with flammable fabrics and that the directly related financial loss exceeds a quarter billion dollars.

Id.

[30] 35 Fed. Reg. 8943 (1970).

[31] 35 Fed. Reg. 6211 (1970) (carpets and rugs); 35 Fed. Reg. 19,702 (1970) (small carpets and rugs).

[32] 37 Fed. Reg. 11,362 (1972), *as amended* 38 Fed. Reg. 15,095 (1973). This standard is designated DOC FF 4-72.

[33] 36 Fed. Reg. 14,062 (1971), *as amended* 37 Fed. Reg. 14,624 (1972). This standard is designated DOC FF 3-71.

[34] 15 U.S.C. § 2079(b) (Supp. II, 1972).

> The Flammable Fabrics Act is a strong and useful regulatory statute, whose implementation has been virtually nullified because it is split among three federal agencies (the Department of Commerce, the Federal Trade Commission, and the Food and Drug Administration).

Act, the Commission has lost little time in recommending and implementing new standards.[35] However, significant problems remain.[36]

III. Standards Under the Act

Regardless of which definition of "defect" is utilized in a strict liability case, if compliance with a federal flammability standard is allowed by courts to negate the existence of a defect, then careful consideration must be given to the adequacy of the federal standards.

> Combining these functions in one strong regulatory agency is necessary if the law is to be effectively implemented.

S. Rep. No. 92-835, 92d Cong., 2d Sess. 19 (1972).

[35] In assuming duties under the Flammable Fabrics Act, the Commission stated its intention to "discharge its responsibilities . . . vigorously, expiditiously, and without compromise in order to protect the public from the hazards to life, health, and property caused by dangerously flammable fabrics." 38 Fed. Reg. 24,923 (1973). One of the first actions of the Commission was to amend the flammability standards for mattresses, with an immediate effective date instead of the usual 1-year delay. The Commission found the immediate effective date to be in the public interest. 38 Fed. Reg. 15,095 (1973). Labelling and record keeping requirements were instituted. 16 C.F.R. § 302.20 (1975). The Commission has moved into the area of children's sleepwear by promulgating labelling and advertising requirements under standard DOC FF 3-71, effective March 11, 1974. 16 C.F.R. § 302.19 (1975). Recordkeeping and sample test requirements have been promulgated under standard DOC FF 3-71. 16 C.F.R. § 302.19 (1975). The Commission has also used its authority for cease and desist orders and mandatory recall. *See, e.g.*, 2 CCH Cons. Prod. Safety Guide ¶¶ 42,016, 42,154 (1973-75).

[36]

> While the promulgation of the Children's Sleepwear Standard is warranted by the disproportionately high occurrence of clothing ignition accidents among young children (ages 0-5), it can be regarded only as a partial solution to the total problem, since it offers no protection to other high risk groups in the population. Notable among the other groups which appear to have such accidents frequently are the nearly 60% of young children (ages 0-5) who, at the time of their accidents, are wearing clothing other than sleepwear; older children (ages 6-14) who represent approximately 20% of the total cases; and persons over 65 (especially females) among whom both the occurrence and severity of fabric ignition accidents is disproportionately high.

HEW Third Annual Report, *supra* note 6, at 15.

In one instance, the Commission has moved to close some of the gaps in the DOC FF 3-71 standard. Acting on the findings of the Secretary of Commerce that a standard was needed to cover children's sleepwear in sizes 7 to 14, 38 Fed. Reg. 6700 (1973), the Commission issued such a standard on May 1, 1974, 39 Fed. Reg. 15,210 (1974), to be effective May 1, 1975. The size 7 to 14 standard, FF 5-74, is substantively the same as DOC FF 3-71. The only difference is that FF 5-74 does not include a test criterion of DOC FF 3-71 regarding the test time of flaming molten materials.

The policy behind section 402A dictates that a manufacturer who places defective merchandise in the stream of commerce and thereby causes injury to a user cannot explain away the defect by showing compliance with an inadequate standard.[37] Thus, it remains to examine the standards promulgated pursuant to the Flammable Fabrics Act and the efficacy of those standards.

The role of industry must be considered in examining standards formulated under the Act. Industry has a legitimate role in providing fabrics free of undue governmental control and at a reasonable cost to the consumer. This role must be reconciled, however, with industry's continuing duty to produce fabrics that are reasonably safe for consumer use. The government as a consumer advocate or other consumer oriented groups may define "reasonably safe" differently than industry would define the phrase. The process of arriving at a federal standard thus must balance the seemingly competing interests of safety and profitability. The result, as past experience under the Act demonstrates, is that the federal standard, in other than the extremely sensitive area of children's sleepwear, may not be the most technically sophisticated or the most difficult standard to satisfy. Thus, the legislative and administrative process must be considered whenever an attempt is made to define "defect" or "unreasonably dangerous" by use of a federal standard.

The 1953 version of the Act was aimed at fabrics classed as "rapid and intense burning" under Commercial Standard (CS) 191-53.[38] The flammability test procedure was explained as follows:

> The flammability test provided in the Commercial Standard 191-53 makes use of strips of fabric 2 by 6 inches in dimensions. The test consists of measuring the burning time in seconds when the test piece is mounted in a specially designed apparatus and a flame is applied in a prescribed manner. Fabrics with a flame spread of more than 7 seconds are classed as having normal flammability. Those with a flame spread of less than 4 seconds are classed as rapid and intense burning, while those burning

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[37] *See* Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973); *accord,* Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965) (insecticide's compliance with requirements of U.S. Department of Agriculture). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 204 (4th ed. 1971); *Aviation Law—Recent Important Cases,* 26-27 NACCA L.J. 408, 410-11 (1960-61).

[38] "This bill is directed to those fabrics which are classed as rapid and intense burning fabrics." H.R. REP. No. 425, 83d Cong., 1st Sess. 6 (1953).

> in 4 to 7 seconds are rated as having intermediate flammability.[39]

The CS 191-53 rapid and intense classification was amended by Congress in 1954 to reduce burning time from 4.0 to 3.5 seconds.[40] This standard, however, has proven inadequate. The Department of Commerce noted in 1968:

> [T]he testing procedures established by the existing standard of flammability are considered to be technically inadequate to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage.[41]

The Department based its statement upon case studies conducted by the Department of Health, Education, and Welfare which revealed that of 117 garments recovered from 83 burn cases, nine of which resulted in death, all the garments passed the CS 191-53 test for rapid and intense burning.[42] The 1968 studies were confirmed in 1970 when all of 230 garments recovered from 159 burn cases, seventeen of which resulted in death, passed the CS 191-53 test for rapid and intense burning.[43] Other reports revealed that, after twelve years of case studies, in only one incident did the fabric involved fail to satisfy the CS 191-53 standard.[44] The situation is so bizarre that some plaintiff's experts have demonstrated that ordinary toilet tissue will pass the CS 191-53 test.[45] The sad result of the inadequate standard is that virtually no reduction has been made in the number of deaths and injuries associated with flammable fabrics.[46]

The most serious problem with the CS 191-53 test is that the testing procedures do not reflect actual garment use or the actual injury producing elements of a flammable fabric. For example, while the standard measures flame spread, it does not measure such hazardous characteristics as "melting, dripping [or] disintegrating into flaming brands."[47] The melting and dripping characteristics of synthetic fabrics have "been cited by medical authori-

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[39]S. REP. No. 400, 83d Cong., 1st Sess. (1953), *reprinted in* 2 U.S. CODE CONG. & AD. NEWS 1722, 1728 (1953).

[40]Act of August 23, 1954, ch. 833, 68 Stat. 770, *amending* 15 U.S.C. § 1193(a) (1964).

[41]33 Fed. Reg. 15,662 (1968).

[42]*Id.*

[43]35 Fed. Reg. 1019 (1970).

[44]HEFFRON REPORT 117 n.255.

[45]15 ATL NEWS LETTER, Apr. 1972, at 105.

[46]*See* note 29 *supra.*

[47]33 Fed. Reg. 15,662 (1968); HEFFRON REPORT 138.

ties as a hazard more serious than flaming."[48] Further, the CS 191-53 test standard lacks a "quantitative measure of flame intensity, heat generation or heat transfer."[49] As the National Bureau of Standards reported in 1970:

> It is tacitly assumed in the present mandatory standard (CS 191-53) that those materials that burn more rapidly are more dangerous. It is known, however, that the total amount of heat given off as well as the rate of burning are important in determining the hazard from a burning fabric . . . .[50]

The failure of the standard to measure flame intensity has had the untoward effect of banning burning fabrics with small, non-intense flames igniting in less than 3.5 seconds, while passing a burning fabric with a voluminous, intense flame igniting in slightly more than 3.5 seconds.[51] Other problems in the CS 191-53 procedures are the failure to include adequate sampling techniques, to evaluate independently the ease of ignition and flame-spread time, to insure that all hazardous materials are ignited, and to exclude materials that are slow to ignite but otherwise are rapid and intense burning fabrics.[52]

Although many problems inherent in the CS 191-53 test procedures have been recognized, their correction has been quite slow. CS 191-53 continues to be the prevalent test, and only in extra-sensitive areas are stricter standards utilized. One sensitive area is children's sleepwear, where new standards have been promulgated. The new procedure, DOC FF 3-71, is more sophisticated than CS 191-53 and recognizes dangerous elements such as dripping and melting, and residual flame time.[53] However, DOC FF 3-71 is still subject to technical criticism,[54] and, as one study notes, it may

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[48] *1967 House Hearings, supra* note 16, at 158. As one commentator pointed out:

> The Act only deals with rate of burning and does not cover such serious hazards as fabrics which become molten masses when exposed to burning. The extremely hot and adhesive melted substance is more of a problem than the fire itself.

Swartz, *Product Liability: The Torch Cases*, 76 CASE & COMMENT, Jan.-Feb. 1971, at 6.

[49] 33 Fed. Reg. 15,662 (1968).

[50] NATIONAL BUREAU OF STANDARDS, TECHNICAL NOTE 525, THE FLAMMABLE FABRICS PROGRAM, 1968-1969, at 3 (1970).

[51] *1967 House Hearings, supra* note 16, at 157.

[52] 33 Fed. Reg. 15,662 (1968); HEFFRON REPORT 138.

[53] *See generally* 36 Fed. Reg. 14,062 (1971), *as amended* 37 Fed. Reg. 14,624 (1972).

[54] Some problems inherent in CS 191-53, such as the 45-degree test and testing of combinations of garments, may still apply to the new procedures. *See* HEFFRON REPORT 156. For a discussion of standards on carpets, see *Hearings*

apply in only 3 percent of flammable fabrics cases.[55] Thus, even where CS 191-53 has been replaced, the new standards may be questioned both as to technical sophistication and adequacy of coverage.

The problems associated with flammable fabric standards continue to be discussed. In February 1975, Commisioner Kushner of the Consumer Product Safety Commission noted that mortality resulting from burn injuries is ten times greater than mortality resulting from nonburn injuries. The Commission has directed its staff to study for other clothing items the feasibility of adopting, with due regard for technological limitations and the economics of the industry,[56] a flammability standard similar to that utilized to test children's sleepwear. Ultimately, when fire retardant fabrics become available at competitive prices, informed consumer choice could be substituted for mandatory flame retardant standards. Until that time, however, the problems of flammable fabric standards and the attendant litigation will persist.

A threshold issue in a flammable fabric's case is the "supremacy clause" contained in the Act, which provides that the Act is "intended to supersede any law of any State . . . inconsistent with [the Act's] provisions."[57] In *Raymond v. Riegel Textile Corp.*,[58] the defendant manufacturer contended that its compliance with federal flammability standards shielded it from tort liability under state law. In rejecting the defendant's contention, the First Circuit reasoned that the 1967 amendments to the Act,[59] which included the "supremacy clause,"[60] were intended to increase protection to consumers and provide continual updating of flammability standards to keep pace with the advancing technology of the fabric industry. The court, however, noted that no new standards had been promulgated before or after the amendment. Commenting on the "evident solicitude of Congress for the plight of burn victims,"[61] the court held that the application of section 402A standards was not inconsistent with the Act. However, the court's

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on Flammable Fabrics and Other Fire Hazards to Older Americans, supra note 6, at 9; HEFFRON REPORT 144.

[55] Distribution of fabric items by age of victims for 3553 cases studied by NBIE [National Burn Information Exchange] . . . indicates that less than 3% of the more than 3,500 cases would have come under the protection of the new Children's Sleepwear Standard.

HEW THIRD ANNUAL REPORT, *supra* note 6, at 53.

[56] 2 CCH CONS. PROD. SAFETY GUIDE ¶ 42,230 (1975).

[57] 15 U.S.C. § 1203 (1970).

[58] 484 F.2d 1025 (1st Cir. 1973).

[59] 15 U.S.C. §§ 1191 *et seq.* (1970).

[60] *Id.* § 1203.

[61] 484 F.2d at 1027.

rationale applies equally to any theory of recovery. The *Raymond* court thus established that the supremacy clause of the Flammable Fabrics Act will not prevent an action based upon section 402A or upon any other theory of recovery.

IV. Theories of Recovery

Private actions for injuries resulting from fabric ignition, especially clothing, have been based upon three theories of recovery: negligence, warranty, and strict liability. Although fabric ignition actions predicated on negligence have proven to be a viable concept for recovery in certain circumstances,[62] the negligence theory presents inherent substantive and procedural problems, such as contributory negligence,[63] assumption of risk,[64] identification of the cause of a defect,[65] and overcoming a defendant's "experts parade" concerning a product's failure or defect.[66] Warranty theory, as originally applied, provided an inadequate remedy because of the contract requirements of notice, representation, reliance, privity, sale, and disclaimer.[67] Many of these contract rules, however, are no longer applicable to warranty actions.[68] Privity, the most significant vestige of contract law in implied warranty actions, finally has been discarded in many circumstances.[69] The theory of implied warranty now finds frequent application in flammable fabrics litigation.[70]

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[62]Ross v. Johns Bargain Stores Corp., 464 F.2d 111 (5th Cir. 1972); Sherman v. M. Lowenstein & Sons, 28 App. Div. 2d 922, 282 N.Y.S.2d 142 (1967); Beckerman v. Walter J. Munro, Inc., 25 App. Div. 2d 448, 266 N.Y.S.2d 996 (1966); Timberlake v. M.A. Henry Co., 104 N.Y.S.2d 284 (Sup. Ct., N.Y. County), *aff'd*, 278 App. Div. 686, 103 N.Y.S.2d 452 (1951).

[63]*See* W. Prosser, Handbook of the Law of Torts § 65, at 416-27 (4th ed. 1971). *See generally* Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 Minn. L. Rev. 105 (1948).

[64]*See generally* Keeton, *Assumption of Risk in Products Liability Cases*, 22 La. L. Rev. 122 (1961).

[65]Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

[66]Ashe, *So You're Going To Try a Products Liability Case*, 13 Hastings L.J. 66, 74 (1961).

[67]Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 Geo. L.J. 286, 291-92 (1966).

[68]Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 11 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1124 (1960).

[69]Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[70]Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671 (D.C. Cir. 1956); Deffebach v. Lansburgh & Bros., 150 F.2d 591 (D.C. Cir.), *cert. denied*, 326 U.S. 772 (1945); Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962); Knab v. Alden's Irving Park, Inc., 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964); Martin v. J.C. Penney Co., 50 Wash. 2d 560, 313 P.2d 689 (1957); Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848 (1952).

The comparatively recent doctrine of strict liability represents the most effective means of recovery in fabric ignition cases.[71] Strict liability has been defined as nothing more than what exists under implied warranty law when stripped of contract theories.[72] Strict liability in tort found its origin in *Greenman v. Yuba Power Products, Inc.*[73] The *Greenman* theory was later codified in section 402A of the *Restatement (Second) of Torts.*[74] Section 402A operates to reduce the difficulty of proving vendor negligence, and it shifts the burden of loss from the consumer to those putting defective products on the market.[75] The section presents three elements

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[71]The term "strict liability" refers to actions based upon section 402A of the *Restatement (Second) of Torts* and is not to be confused with strict liability based upon inherently dangerous articles. For examples of actions where clothing was considered an inherently dangerous article because of flammability, see Dayton v. Harlene Frocks, 274 App. Div. 1015, 86 N.Y.S.2d 614 (1948), *aff'd*, 299 N.Y. 609, 86 N.E.2d 176 (1949); Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944), *aff'd*, 294 N.Y. 680, 60 N.E.2d 839 (1945).

[72]Greeno v. Clark Equipment Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

[73]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[74]RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A].

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Although section 402A is the generally accepted definition of strict tort liability, there has been comment that *Greenman* presents a somewhat different approach. *See* Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alas. 1969); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[75]The rationale of section 402A is described in comment *c*.

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused

necessary for recovery: (1) A defect must exist at the time the product leaves the seller's hands, (2) the plaintiff must suffer injury, and (3) the injury must have been caused by the defective or unreasonably unsafe condition of the product.[76]

The term "seller" as specified in the first element of section 402A has taken on a broad meaning in fabric ignition cases. For example, in *Carter v. Joseph Bancroft & Sons*,[77] the defendants contended that they were not sellers within the meaning of section 402A but were only licensors, who permitted articles made according to their specifications and standards to be identified by their trademark. The *Carter* court rejected this argument, holding that a party advancing as his own product a chattel manufactured by another is subject to the same liability as the manufacturer.[78]

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by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Comment *c*'s viewpoint appears to be the same as that which Justice Traynor took in his concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944), and which was later adopted by Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Professor Prosser argued that strict liability would provide a highly desirable incentive for producers to make their products safe. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119-22 (1960). In addition to Justice Traynor's "risk spreading" and Professor Prosser's "safety incentive," there are two other policy considerations favoring strict liability—frustration of consumer expectations and proof problems. *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 339-40 (1974).

[76] § 402A. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103, at 671 (4th ed. 1971). *See also* Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 (1971).

[77] 360 F. Supp. 1103 (E.D. Pa. 1973).

[78] *Id.* at 1106-07. The court relied on *Restatement (Second) of Torts*, section 400, comment *d*, which states:

> The rule stated in this Section applies only where the actor puts out the chattel as his own product. The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor's reputation is an assurance to the user of the quality of the product. On the other hand, where it is clear that the actor's only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus, one puts out a chattel as his own product when he puts it out under his name or af-

Significantly, the term seller is not dependent upon an actual commercial sale, but merely requires the injection of the product into the "stream of commerce."[79] The definition can include a gratuitous transferor.[80] To be a seller under section 402A, however, does require more than an isolated or occasional sale of a product by one whose business does not include the sale of that product. In this respect, the term is analagous to the "merchant" requirement of Article 2 of the Uniform Commercial Code.[81]

The requirement that a "defect" exist is the most important element of section 402A since it distinguishes strict liability from absolute liability.[82] It is generally agreed that there are three types of product defects: (1) Those resulting from product design, (2) malfunctions in the manufacturing process, or (3) a manufacturer's failure to supply complete information concerning the risks and dangers involved in the use of the product.[83]

Section 402A literally applies to products "in a defective condition *unreasonably dangerous*."[84] Because of the lack of clarity of this wording, it is important to determine whether a defect must

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fixes to it his trade name or trademark. When such identification is referred to on the label as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the person so identified. The mere fact that the goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. The casual reader of a label is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source. So too, the fact that the seller is known to carry on only a retail business does not prevent him from putting out as his own product a chattel which is marked in such a way as to indicate clearly it is put out as his product. However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

[79]Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

[80]*See, e.g.*, Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 112-17, 258 N.E.2d 681, 685-88 (1970).

[81]§ 402A, comment *f*.

[82]*See* Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 294 (1966).

[83]*See* Keeton, *Products Liability*, 50 F.R.D. 338 (1971); Comment, *Misuse as a Bar to Bystander Recovery Under Strict Products Liability*, 10 HOUSTON L. REV. 1106, 1107 (1973).

[84]§ 402A (emphasis added).

also be unreasonably dangerous. In *LaGorga v. Kroger Co.*,[85] a fabric ignition case, the court equated the phrase "unreasonably dangerous" with the phrase "or not reasonably safe."[86] The court disposed of the unreasonably dangerous requirement by stating that "the basic design of a product, perfectly manufactured, is defective if it results in an unreasonably dangerous product for then an unreasonably dangerous product is synonomous with a defective condition."[87]

V. Problems in Recovering Under a Flammable Fabrics Tort Action

Whether or not "unreasonably dangerous" is considered an element of section 402A, it is essential to determine what effect compliance or noncompliance with the Flammable Fabrics Act's standard, CS 191-53, has on the establishment of a defect. An examination of the case law indicates that noncompliance with CS 191-53 should be sufficient for a showing of a defect.[88] Either as a result of the rejection of CS 191-53 as a viable tort standard or because of the lack of sufficient material to test, the courts have allowed proof of a defect based upon lay testimony as to the burning qualities of the fabric at the time of injury or expert testimony without strict adherence to the test procedures contained in CS

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[85]275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969).

[86]*Id.* at 380. The *LaGorga* court, apparently critical of the words "unreasonably dangerous," chose to add the words "or reasonably safe." The term "unreasonably dangerous" has been criticized as having overtones of the ultra-hazardous requirement found in the other type of strict tort liability. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965). *See generally* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816 (1962).

[87]275 F. Supp. at 380. A similar analysis of a "defective condition unreasonably dangerous" has been made where it is stated that when a product is perfectly manufactured, liability will be imposed upon proof that the article as designed and marketed is unreasonably dangerous. Thus, in cases involving defectively manufactured goods, both requirements must be met; however, where the alleged defect is one of design, the phrase may be read as imposing only a single requirement. *See* Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 Geo. L.J. 286, 297 (1966).

The terms "defective condition" and "unreasonably dangerous" have been used interchangeably, Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964), and it has been argued that the two terms have the same meaning. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14-15 (1965). At least two jurisdictions have entirely eliminated the words "unreasonably dangerous" from § 402A. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (Law. Div. 1973).

[88]Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (dictum).

191-53.[89] Thus, circumstantial evidence[90] is sufficient to prove a defect in fabric ignition cases.

Compliance with CS 191-53 should have no effect except in negligence cases. In *Sherman v. Lowenstein*,[91] the court stated that compliance with CS 191-53 *might* be *some* evidence of due care in a negligence case but, standing alone, was not sufficient to be an absolute defense. The *Sherman* case, however, is a significant precedent only in actions based upon negligence because "due care" is immaterial in strict liability actions.[92]

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[89]LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969), is authority for the proposition that lay testimony is a sufficient ground for a finding of a defect in a product. However, the plaintiff in *LaGorga* did use "expert" testimony. Nevertheless, defects in a product may be shown by circumstantial evidence. *See* Cravens, Dargan & Co. v. Pacific Indem. Co., 29 Cal. App. 3d 594, 105 Cal. Rptr. 607 (1972). Furthermore, it has been stated that:

> "Except for malpractice cases (against a doctor, dentist, etc.) there is no general rule or policy requiring expert testimony as to the standard of care, and this is true even in the increasingly broad area wherein expert opinion will be received. . . . Courts could very easily expand the area in which expert testimony is required to establish the standard of conduct, but the tendency has been instead to resolve doubtful questions in favor of allowing the jury to decide the issue of negligence without its aid. . . ."

Thompson v. Ohio Fuel Gas Co., 9 Ohio St. 2d 116, 119, 224 N.E.2d 131, 134 (1967), *quoting from* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.1, at 966 (1956). *See also* Carter v. Joseph Bancroft & Sons, 360 F. Supp. 1103 (E.D. Pa. 1973) (where plaintiff's Ban-lon dress was engulfed in fire while she and other guests were being served crepe suzettes at a dinner party, the plaintiff's dress was the only clothing that ignited and burned); Knab v. Alden's Irving Park, Inc., 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964) (witnesses stated that the plaintiff's trousers flamed like a burning torch, and a doctor testified that the plaintiff's injuries were a result of a "flash-type burn").

[90]For a discussion of the use of circumstantial evidence as a viable means of proof in a products liability case, see Note, *Products Liability: Methods of Pleading and Proof for the Plaintiff*, 49 N.D.L. REV. 105 (1972); Note, *Circumstantial Evidence in Strict Products Liability Actions*, 1974 WASH. U.L.Q. 804. Circumstantial evidence also is admissible to identify the manufacturer of flammable fabrics. *See, e.g.*, Smith v. J.C. Penney Co., 525 P.2d 1299 (Ore. 1974).

[91]28 App. Div. 2d 922, 282 N.Y.S.2d 142 (1967).

[92]Due care in the preparation and sale of the product is specifically excluded by subsection (2) (a) of section 402A which states:

> The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product.

Comment *a* to section 402A states in part:

> This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is in-

The problem with the use of CS 191-53 in tort actions is that since the Act is essentially criminal in character, it does not provide for tort remedies.[93] The question is whether the standard of a criminal statute should control the standard of case in negligence actions or the establishment of a defect in section 402A actions. In *Raymond v. Riegel Textile Corp.*,[94] the court held that compliance with a legislative enactment does not preclude a finding of negligence. Thus, a defendant's compliance with CS 191-53, or compliance with the usual custom and practice of the industry[95] in the manufacture of clothing, has been held to be no bar to plaintiff's recovery under section 402A.

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serted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence.

[93]15 U.S.C. § 1196 (1970). *See* Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973).

[94]484 F.2d 1025 (1st Cir. 1973). The court relied on *Restatement (Second) of Torts* section 288C, and 286, comment *d*. Section 288C states:

> Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.

Section 286, comment *d*, states in part:

> *Where no provision for civil liability.* The enactment or regulation may, however, provide only for criminal liability, and not for civil liability; or in rare instances it may merely prohibit certain conduct, and contain no provision for any liability at all. In such cases the initial question is whether the legislation or regulation is to be given any effect in a civil suit. Since the legislation has not so provided, the court is under no compulsion to accept it as defining any standard of conduct for purposes of a tort action.
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> . . . .
>
> On the other hand, the court is free, in making its own judicial rules, to adopt and apply to the negligence action the standard of conduct provided by such a criminal enactment or regulation. This it may do even though the provision is for some reason entirely ineffective for its initial purposes, as where a traffic signal is set up under an ordinance which never has been properly published and so for the purposes of a criminal prosecution is entirely void. The decision to adopt the standard is purely a judicial one, for the court to make. When the court does adopt the legislative standard, it is acting to further the general purpose which it finds in the legislation, and not because it is in any way required to do so.

See also Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 204 (4th ed. 1971); *Aviation Law—Recent Important Cases*, 26-27 NACCA L.J. 408, 410-14 (1960-61).

[95]Although an entire industry may comply with certain customs or practices, there may still be liability if those practices are considered unreasonable. *See* The T.J. Hooper, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

Regardless of the standards concerning the burning qualities of clothing, a defendant could contend that the "intended use" of clothing does not include exposure to flame. Thus, any claim based upon section 402A for burns from flammable clothing would be barred because the clothing was put to an "abnormal use." The *Raymond* court observed that "unreasonable danger" must be measured in light of such normal conditions as accidental exposure of a garment to heat or flame,[96] and that "normal use" of clothing encompasses an environment which contemplates such exposure. This "environmental approach" suggests that the "intended use"[97] or "abnormal use"[98] defenses to section 402A, for all practical purposes, have little significance in cases involving flammable fabrics.[99]

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[96]484 F.2d at 1027. Section 402A, comment *h*, states in part:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

It has been argued that comment *h* is one of the principal circumscribing factors of section 402A and could represent a significant limiting factor on the seller's liability since normal handling and consumption could be equated with intended use. *See* Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 308-10 (1966). However, the *Raymond* court expressly rejected this approach and took an expansive view of what constitutes normal handling. Consequently it appears that, at least in fabric cases, a very broad foreseeability standard may apply to the manufacturer concerning use of a product.

[97]For the origin of the "intended use doctrine," see Note, *Abnormal Use in the Strict Products Liability Case—The Plaintiff's Burden of Proof?*, 6 SW. U.L. REV. 661, 667 n.32 (1974).

[98]For an explanation of what constitutes abnormal use, see Comment, *Misuse as a Bar to Bystander Recovery Under Strict Products Liability*, 10 HOUSTON L. REV. 1106, 1107-12 (1973). *See also* Dale & Hilton, *Use of the Product—When Is It Abnormal?*, 4 WILLAMETTE L.J. 350 (1967); Noel, *Products Liability: Bystanders, Contributory Fault and Unusual Uses*, 50 F.R.D. 321, 332-33 (1971).

[99]The manufacturer or seller of clothing could offer the defense that the intended use of clothing does not include exposure to flames, despite the foreseeability of this event. Such a defense would be analogous to the "intended use" defense in Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967), and Schemel v. General Motors Corp., 261 F. Supp. 134 (S.D. Ind. 1966), *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), in which the courts stated that the intended purpose of an automobile does not include participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions might occur.

VI. Phantom Defendants

Once it is established that compliance with CS 191-53 does not bar a plaintiff's action, there still remains the problem of proving that the injuries were caused by a defect in the fabric or clothing. However, it may be extremely difficult to prove that the clothing was defective because of its burning qualities. The fabric may be so highly flammable that nothing remains, or what does remain may be insufficient for an expert to test properly.[100] In certain instances where the article and its label are completely consumed by flames, the user of the article may be unable to identify the manufacturer or distributor. These unidentifiable manufacturers and distributors are in effect "phantom defendants." In these "phantom defendant" situations, the manufacturer or distributor will be immune from liability unless the user can recall the place where he purchased the article or the brand name of the article.[101]

However, *Evans* and *Schemel* seem to represent a minority view. Other jurisdictions and commentators have construed the "intended use" of an automobile as not one of merely providing a means of transportation, but of providing a means of *safe* transportation. Both the courts and commentators recognize that a manufacturer may be held liable for failure to exercise reasonable care in a design that does not consider a collision-prone environment. Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973); W. Prosser, Handbook of the Law of Torts § 96, at 646 (4th ed. 1971); Noel, *Manufacturer's Liability for Negligence*, 33 Tenn. L. Rev. 444, 450-51 (1966); Saalfeld, *The Liability of an Automobile Manufacturer for Failure To Design a Crashworthy Vehicle*, 10 Willamette L.J. 38 (1970); Note, Ellithorpe—*Adoption of Crashworthiness via Strict Products Liability*, 4 Memphis St. U.L. Rev. 497 (1974); Note, *The Automobile Manufacturer's Liability to Pedestrians for Exterior Design: New Dimensions in "Crashworthiness,"* 71 Mich. L. Rev. 1654 (1973); Note, *Automobile Design Liability:* Larsen v. General Motors *and Its Aftermath*, 118 U. Pa. L. Rev. 299 (1969); 42 Notre Dame Law. 111 (1966).

The court in *Raymond* agreed with the view that a manufacturer must "anticipate the environment which is normal for use of his product and . . . must anticipate the reasonably foreseeable risks of the use of his product in such an environment." Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-84 (4th Cir. 1962).

[100] *See, e.g.*, Knab v. Alden's Irving Park, Inc., 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964).

[101] If the user can identify the place where he purchased the article, then the seller could be named as a defendant since anyone in the "stream of commerce" can be a party defendant in strict tort liability actions. *See* § 402A, comment *f*. *See also* Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (excellent discussion of the stream of commerce rationale).

The "phantom defendant" cases are most objectionable because these unidentifiable manufacturers and distributors are inadvertently afforded greater protection than identifiable manufacturers of less flammable articles.

Cases involving "phantom defendants" could be resolved by revising CS 191-53 so as to impose a requirement that the highly dangerous flammable qualities of the fabric are removed. However, if the Consumer Product Safety Commission fails to revise the standard, or if the standard is revised so that fabrics still retain unreasonably dangerous qualities, then it would appear that only two viable remedies remain. First, the Commission should require that all clothing have labels which (1) identify the manufacturer of the fabric, and (2) are impervious to flame.[102] Second, if the Commission fails to adequately revise CS 191-53 and fails to provide "stop-gap" measures such as identifying labels which are insensitive to flame, then the courts should seriously consider holding the entire fabrics industry liable for injuries to the consumer in the "phantom defendant" cases.[103]

VII. Conclusion

From a review of actions available for injuries resulting from flammable fabrics, at least two conclusions are warranted. First, only in negligence cases does the seller's compliance with the standards of the Act have any effect. Secondly, the Act does not bar actions in strict liability[104] nor does it set the standard for what constitutes a defect.

Other considerations emerge from an examination of the Act. It is apparent that the test procedures of CS 191-53 are not technically sophisticated and do not insure the safety of the consumer. The Act has failed to accomplish its goal of eliminating fabrics with unreasonable risks. Until changes are made in the standard-setting procedures of CS 191-53, the Act should at least require

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If the user can identify the brand name of the article, then the party who affixes his mark or label to the article may be named as a defendant. *See* note 77 *supra* and accompanying text.

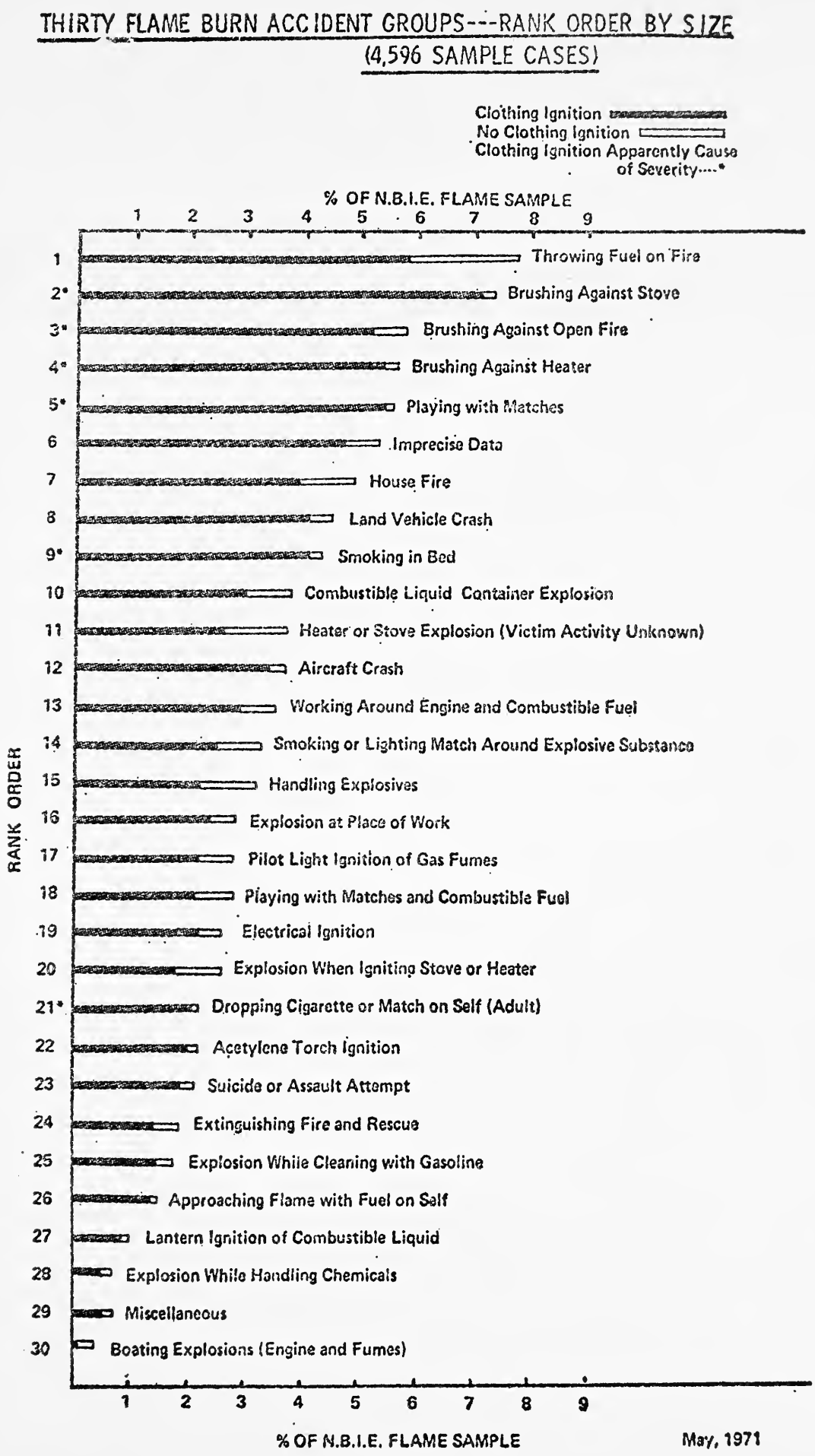
[102]The Consumer Product Safety Commission appears to have the power to authorize such labelling. *See* 15 U.S.C. § 2063 (Supp. III, 1973).

[103]For authority that an entire industry may be held liable under the theory of strict tort liability, see Note, *Strict Liability in Tort Imposed Upon an Entire Industry*, 7 Valp. U.L. Rev. 417 (1973). *See also* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), *noted in* 42 U. Cin. L. Rev. 341 (1973); 19 Wayne L. Rev. 1299 (1973).

[104]In addition to developing civil remedies, the states appear to be free to develop stricter standards through legislative action without violating the commerce clause. American Apparel Mfrs. Ass'n v. Sargent, 384 F. Supp. 289 (D. Mass. 1974).

labeling sufficiently flame resistant to allow the plaintiff to identify the proper defendant in order to recover for his injuries.

Since CS 191-53 has been replaced in sensitive areas such as children's clothing by a seemingly stricter standard, inventive attorneys may again raise compliance as a defense. However, before this defense is accepted, the new standards must be subjected to serious inquiry. Compliance should present a significant defense only if the test procedures are technically sophisticated, measuring all injury producing elements of the fabric in a situation of actual garment use, and designed to eliminate those injury producing elements. The promulgation of such a standard and the development of flame retardant fabrics is within the grasp of industry. Until industry takes these steps, however, the consumer should not be deprived of the effective private remedy afforded by strict liability actions.


THIRTY FLAME BURN ACCIDENT GROUPS---RANK ORDER BY SIZE
(4,596 SAMPLE CASES)
Clothing Ignition
No Clothing Ignition
Clothing Ignition Apparently Cause of Severity----*
% OF N.B.I.E. FLAME SAMPLE
1 2 3 4 5 6 7 8 9
RANK ORDER
1 Throwing Fuel on Fire
2* Brushing Against Stove
3* Brushing Against Open Fire
4* Brushing Against Heater
5* Playing with Matches
6 Imprecise Data
7 House Fire
8 Land Vehicle Crash
9* Smoking in Bed
10 Combustible Liquid Container Explosion
11 Heater or Stove Explosion (Victim Activity Unknown)
12 Aircraft Crash
13 Working Around Engine and Combustible Fuel
14 Smoking or Lighting Match Around Explosive Substance
15 Handling Explosives
16 Explosion at Place of Work
17 Pilot Light Ignition of Gas Fumes
18 Playing with Matches and Combustible Fuel
19 Electrical Ignition
20 Explosion When Igniting Stove or Heater
21* Dropping Cigarette or Match on Self (Adult)
22 Acetylene Torch Ignition
23 Suicide or Assault Attempt
24 Extinguishing Fire and Rescue
25 Explosion While Cleaning with Gasoline
26 Approaching Flame with Fuel on Self
27 Lantern Ignition of Combustible Liquid
28 Explosion While Handling Chemicals
29 Miscellaneous
30 Boating Explosions (Engine and Fumes)
1 2 3 4 5 6 7 8 9
% OF N.B.I.E. FLAME SAMPLE
May, 1971

Notes

Indiana's Rape Shield Law: Conflict with the Confrontation Clause?

I. Introduction

In recent years public concern for the plight of rape victims has increased. With that concern has come sympathy for the all too frequent feeling on the part of the victim that it is she who is on trial, rather than the defendant. The primary contributor to this feeling on the part of the victim is the fact that, traditionally, evidence of a rape victim's previous sexual conduct has been admitted at trial for a variety of purposes, some highly relevant and others probably irrelevant. The Indiana General Assembly[1] and several other state legislatures[2] have passed statutes which strictly limit introduction of such evidence. The purpose of this Note is to ascertain whether such statutes will, under certain circumstances, violate a defendant's right to be confronted with the witnesses against him. To facilitate such an inquiry, this Note first briefly examines the confrontation clause. Following that review is an analysis of *Davis v. Alaska*,[3] a 1974 United States Supreme Court decision illustrative of the tests employed in determining whether a state shield statute, in *Davis* a juvenile adjudication shield statute, conflicts with the confrontation clause. Finally, the type of analysis employed in *Davis* is utilized to determine whether the new rape shield law will conflict with the confrontation clause.

II. The Confrontation Clause

The United States Constitution guarantees to a defendant in a criminal case the right "to be confronted with the witnesses

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[1] Ind. Code §§ 35-1-32.5-1 to -4 (Burns Supp. 1975).

[2] This Note does not purport to identify all states that have passed rape shield laws. Some exemplary statutes are the following: Cal. Evid. Code §§ 782, 1103 (West Supp. 1975); Fla. Stat. Ann. § 794.022(2) (Supp. 1975-76); Iowa Code Ann. § 782.4 (Supp. 1975-76); Mich. Comp. Laws Ann. § 750.520(j) (Supp. 1975-76).

[3] 415 U.S. 308 (1974).

against him."[4] That right has been incorporated into the fourteenth amendment and, thus, applies to the states.[5]

A primary purpose of the confrontation clause is to secure the right of cross-examination.[6] One of the original evils which the confrontation clause was designed to prevent was the admission into evidence of an *ex parte* affidavit when the witness was not present at the trial for questioning.[7] Addressing that concern, the Supreme Court in 1895 reasoned that the accused must be afforded an opportunity

> not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[8]

Three purposes of the confrontation clause are thus detectable: To insure the right of cross-examination, to afford the jury an opportunity to assess credibility by observing demeanor, and to insure that a witness will testify under oath and be sufficiently impressed with the seriousness of such testimony.[9]

These purposes are most often thwarted when the witness is not present in the courtroom to testify.[10] When considering rape

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[4]U.S. CONST. amend. VI. Similarly, the Indiana Constitution provides that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witness face to face." IND. CONST. art. 1, § 13.

[5]Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[6]Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[7]Mattox v. United States, 156 U.S. 237 (1895).

[8]*Id.* at 242-43.

[9]California v. Green, 399 U.S. 149 (1970).

[10]Many of the Supreme Court decisions dealing with the confrontation clause involve an absent witness. For example, if the state wishes to introduce into evidence a statement made by a witness at a preliminary hearing, this may not be done if the defendant at the hearing was unrepresented by counsel and did not avail himself of the opportunity to cross-examine that witness. Pointer v. Texas, 380 U.S. 400 (1965). Even where the witness was cross-examined at a preliminary hearing, the hearing testimony is inadmissible at trial absent a good-faith showing that the state attempted to procure the witness' presence at trial. Barber v. Page, 390 U.S. 719 (1968).

Other cases deal with admission of out-of-court testimony where the witness is present at trial but is asserting a privilege. Typical of these cases is the problem presented by admission of a co-defendant's confession which incriminates the defendant. Bruton v. United States, 391 U.S. 123 (1968) (joint trial of the two defendants); Douglas v. Alabama, 380 U.S. 415 (1965) (separate trial of the two defendants). For rules applicable where the co-

shield laws, however, the more germane confrontation clause issues arise in cases where the witness has taken the stand, but, relying on a privilege, refuses to testify about certain subjects. For example, the constitutional privilege against self-incrimination may be relied upon by a witness. Where two constitutional guarantees conflict, such as the privilege against self-incrimination and the right to confrontation, it is not a foregone conclusion that the right to confrontation must prevail.[11] However, it appears that where the testifying witness is protected by a mere evidentiary rule, that rule must succumb to the defendant's right to confrontation.[12]

Unlike constitutional or evidentiary conflicts with the confrontation clause, the rape shield laws provide a possible statutory conflict. Utilizing the statutory privilege provided by a rape shield law, the state may successfully prohibit a defendant from questioning the chief prosecuting witness as to certain aspects of her sexual conduct. Rape shield laws are therefore analogous to other statutory privileges, such as the informer privilege and the juvenile adjudication shield. Thus, an analysis of the application of these two privileges may afford some insight into the constitutionality of a rape shield law.

The informer privilege operates to keep secret the identity of persons who provide information regarding criminal activities to law enforcement officials. That privilege, if asserted by an informant appearing on behalf of the state at trial, must yield to

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defendants are also considered co-conspirators, see United State v. Nixon, 418 U.S. 683 (1974); Dutton v. Evans, 400 U.S. 74 (1970).

[11]Frazier v. Cupp, 394 U.S. 731 (1969); Douglas v. Alabama, 380 U.S. 415 (1965); Alford v. United States, 282 U.S. 687 (1931). The Court in *Alford* noted an obligation on the part of a trial court to protect a witness from invasion of his rights against self-incrimination but not to protect the witness from being discredited.

[12]For example, in Mississippi the "voucher" rule, wherein a party "vouches" for any witness he may call, thus precluding any right to cross-examine that witness, could not operate to deprive a defendant of his right to confront an adverse witness. In Chambers v. Mississippi, 410 U.S. 284 (1973), a party not on trial had confessed four times to the crime for which the defendant was being prosecuted. The state failed to call that party as a witness. Subsequently, the defendant called the witness himself, primarily for the purpose of exposing such confessions. The Mississippi court, relying on the voucher rule, refused to allow cross-examination. The United States Supreme Court found the witness to be adverse and held the Mississippi ruling to be a denial of the defendant's right to confrontation.

Further, the requirements of the hearsay rule do not attach at all proceedings. Hearsay may be admissible at a suppression hearing. United States v. Matlock, 415 U.S. 164 (1974).

the defendant's right to confrontation.[13] The disclosure of an informant's identity may also be at issue, however, where the informant's identity is alluded to at trial when the informant himself is not present and testifying. In *Roviaro v. United States*,[14] the Supreme Court invoked a balancing test to determine if the state's interest in protecting the informant's identity would prevail over the defendant's desire to have his identity disclosed. Balancing these interests, the Court found the defendant's interest to be weightier. In arriving at this conclusion, the Court considered a number of factors. A factor on the state's side was the underlying purpose of protecting informers—encouragement of citizen crime reporting. Additionally, the Court considered a state's need to protect a particular informer, that is, whether an actual threat to that individual exists. Factors considered on the defendant's side included the possible exposure of defense theories, the nature of the crime charged, and the materiality and vulnerability of any testimony for which the informant may have been responsible. After weighing these factors, the Court determined in *Roviaro* that disclosure of the informant's identity was required.[15] The balancing approach utilized in *Rovairo* is similar to the approach taken in *Davis*, wherein a juvenile adjudication shield was at issue.

III. The Confrontation Clause in Conflict with a Juvenile Adjudication Shield Law: *Davis v. Alaska*[16]

The petitioner in *Davis* was convicted of grand larceny and burglary. At his trial, the court issued an order protecting a state

[13]Smith v. Illinois, 390 U.S. 129 (1968). Justice White, concurring, implied that the state would be permitted to protect the informant's identity by stating its reasons for nondisclosure. *Id.* at 133.

[14]353 U.S. 53 (1957).

[15]*Roviaro* was later distinguished in McCray v. Illinois, 386 U.S. 300 (1967), wherein the informant's statement was used to procure a probable cause affidavit. In *McCray*, the Court required that a magistrate issuing an affidavit be aware of the underlying circumstances supporting affiant's belief. Although an informant need not be identified on the affidavit, his reliability must be established to the satisfaction of the issuing magistrate. Aguilar v. Texas, 378 U.S. 108 (1964). For the quantum of evidence necessary to support the affiant's belief in an informer's reliability, see United States v. Harris, 403 U.S. 573 (1971). Despite the more stringent requirements with respect to disclosure set forth in *Aguilar* and *Roviaro*, it is still the rule that a defendant's right to confrontation is not infringed upon by failure to present the informer for testimony. McCray v. Illinois, *supra;* Cooper v. California, 386 U.S. 58 (1967).

Further, the Supreme Court recently held that the right to confrontation does not attach to a prison disciplinary proceeding. The Court recognized the inherent difficulties in maintaining prison discipline if a prisoner were privileged to cross-examine an unknown fellow prisoner who had turned informant. Wolff v. McConnell, 418 U.S. 539 (1974).

[16]415 U.S. 308 (1974).

witness, Green, from cross-examination regarding his adjudication as a juvenile delinquent pursuant to an Alaska rule of children's procedure[17] and an Alaska statute.[18] Green, a key state witness, had been adjudicated a juvenile offender. He was on probation for robbery both at the time of the events to which he would testify and during the time he was assisting the state in preparation of the case against Davis. The stolen property, a safe, was retrieved near Green's property. At trial, Green testified both as to Davis' identity and as to the events at the time of the alleged crime. The defense reasoned that Green's status as a probationer, together with the location of the stolen safe, cast suspicion upon him. Furthermore, in order to divert such suspicion, Green may have wished to incriminate Davis. He may also have felt sufficient pressure from surrounding circumstances to color his pretrial identification and, subsequently, his in-court identification. Such was the nature of Davis' theory of defense which he was prevented from submitting to the jury because of the juvenile adjudication shield statute and the rule of children's procedure.

While the Supreme Court did not deal with the constitutionality of the rule and statute themselves, it did hold that, on balance, the state interest in protecting juveniles was outweighed by the accused's interest in preparing his defense. The balance to be struck was between the probative value of the evidence sought from the witness and the state's legitimate interest protected by the statute and rule.

The state's legitimate interest in protecting juvenile offenders was recognized by the Court. This interest flows from the state's obligation to rehabilitate such offenders. Pursuant to that obligation, a juvenile deliquent might be shielded from exposure of his prior record because such exposure could encourage commission of further crimes and could result in a loss of employment opportunities.[19] Balancing the two interests, the Court concluded that "the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the pro-

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[17]ALAS. R. JUVENILE P. 23.

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

[18]ALASKA STAT. § 47.10.080(g) (1971) provides: "The commitment and placement of a child are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . ."

[19]415 U.S. at 319.

cess of defending himself."[20] It is significant that the Court limited its holding to the facts of the *Davis* case rather than stating a general proposition of law. In fact, Justice Stewart, in his concurring opinion, emphasized "that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions."[21]

The *Davis* case in the area of a juvenile adjudication shield and the *Roviaro* case in the area of an informer shield clearly establish that it is not a foregone conclusion that the right to confrontation will prevail over a statutory shield in every instance. The approach used in both cases involved assessing the probative value of the excluded evidence and determining if that value outweighed the state interest in the asserted privilege.

IV. Application of the *Davis* Test to a Rape Shield Law

In applying the balancing test set forth in *Davis*, there are two relevant inquiries to determine if a rape shield law will violate the confrontation clause. First, what is the probative value of the evidence sought to be excluded by such a law? Second, what legitimate state interest is the statute designed to protect?

A. Relevancy of Sexual Conduct Evidence

From state to state there is little unanimity as to how and under what circumstances evidence of previous sexual conduct may

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[20] *Id.* at 320.

[21] *Id.* at 321 (Stewart, J., concurring). This language was heeded in construing the affect of *Davis* in a subsequent Alaska case. The fact that Green was on probation was seen as a primary factor which could provide him motivation to offer false testimony. Therefore, in Gonzales v. State, 521 P.2d 512 (Alas. 1974), a trial court's decision to exclude evidence of a state witness' prior juvenile adjudication was upheld because that witness was not on probation at the time the events occurred to which he testified and because the witness' lack of credibility was so firmly established at trial that the juvenile adjudication would only have been cumulative.

An Indiana case prior to *Davis* held that evidence of the juvenile adjudication of a state's witness was not admissible in a trial of the defendant for enticing a female into an immoral place. The defendant had set up a mobile house of ill repute in a school bus and solicited the prosecutrix, who was on parole from the Girls School, into his employment. Noel v. State, 247 Ind. 426, 215 N.E.2d 539, *cert. denied*, 385 U.S. 934 (1966).

The right to cross-examination espoused in *Davis* and other confrontation cases is tempered by the nature of a particular proceeding. For example, a deposition, the sole purpose of which is to authenticate records under 18 U.S.C. §§ 3492-93 (1970), need not come endowed with the same range of confrontation rights applicable to a general purpose deposition under 18 U.S.C. § 3503 (1970). United States v. Hay, 376 F. Supp. 264 (D. Colo. 1974).

be admitted. Examples of the various grounds for admissibility may be examined, however, to determine the nature of the probative value rationale.

1. *Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Strong.*—There are some instances in which the proffered evidence has strong probative value. For example, courts have held that where consent is in issue, evidence of previous sexual intercourse between the victim and the accused should be admitted.[22] Once a woman has consented to relations with a particular man, a strong argument can be made to infer that she consented on a subsequent occasion. Conversely, one could argue that no such inference should be drawn because every woman ought to be free to change her mind and reassess her wishes with each encounter. However, previous consent with a defendant does at least show the victim's state of mind at an earlier time, and the trier of fact could reasonably infer no change in that state of mind absent some evidence to the contrary.

Perhaps less obvious is the relevance of evidence of previous acts with the defendant where the charge is for carnal knowledge of a girl under the age of consent. It has been held that every act of intercourse committed with such a girl is rape.[23] However, other purposes are espoused for admitting evidence of previous intercourse between the defendant and a girl under the age of consent. One is that previous acts with the defendant might be admissible as crimes themselves.[24] Another purpose is to show an intimate relationship between the parties tending to break down self-respect and modesty.[25] The former purpose concerns a subject area outside the scope of this Note—admissibility of the defendant's previous wrongful acts. The latter purpose seems irrelevant. In statutory rape, if the prosecutrix is incapable of consent, it cannot be

[22]Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); People v. Dermartzex, 390 Mich. 410, 213 N.W.2d 97 (1973). In *Dermartzex*, acts with the defendant both precedent and antecedent to the alleged rape were admitted, but the trial judge was charged with the responsibility of weighing the probative value of the proffered evidence against the risks of unfair surprise, undue confusion, and misleading the jury.

In Indiana the relevancy of intercourse with the defendant was stretched to its limits in Bedgood v. State, 115 Ind. 275, 17 N.E. 621 (1888). The victim therein was subjected to multiple rape, but she dismissed the charge against one defendant with whom she had previously engaged in intercourse. Nevertheless, the court admitted evidence of her sexual conduct with the dismissed defendant in the trial against his companions.

[23]People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893).

[24]A question to the prosecutrix was not objectionable because it tended to prove more than one felony. Daveros v. State, 204 Ind. 604, 185 N.E. 443 (1933).

[25]People v. Gangels, 218 Mich. 632, 188 N.W. 398 (1922).

relevant that she had an intimate relationship with the defendant which jeopardized her modesty or self-respect. Any act of intercourse with an underage girl would be rape regardless of her lack of virtue. It is more likely that the difficulty perceived in these instances is the possibility of a sophisticated and vindictive teenager charging a former boyfriend with rape. That difficulty is more appropriately addressed by statutory rape laws which reflect realistically the age at which a modern girl may be capable of giving consent and which protect younger girls from advances that they are ill-equipped to understand, regardless of their previous occurrence. One modern court held that previous acts with the defendant should have been inquired into where the prosecutrix was under age fifteen.[26] However, while acts with the defendant are likely to be relevant in a forcible rape case, their relevancy is questionable in statutory rape cases.

There is also an obvious probative value to evidence which discloses previous intercourse with someone other than the defendant when such evidence can account for a physical fact in evidence at the trial, such as semen,[27] a ruptured hymen,[28] a pregnancy,[29] or the prosecutrix's physical condition indicating intercourse.[30] However, to be admissible under this theory, a specific instance of intercourse must have been so timed as to conceivably account for the physical evidence.[31] An interesting split occurs if the defendant himself introduces the physical evidence which would be damaging to his case for the sole purpose of using this rationale to enter evidence of the victim's sexual conduct. Some courts have reasoned that where the defendant introduced evidence of a pregnancy himself, there should be no opportunity to rebut an inference flowing from evidence which would not have been introduced but for the defendant's own action. Accordingly, the defendant could not then introduce evidence of previous intercourse with third parties to account for the pregnancy.[32] Some courts have found this reasoning restrictive and have permitted the defendant to

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[26]Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967).

[27]State v. McDaniel, 204 N.W.2d 627 (Iowa 1973); Massey v. State, 447 S.W.2d 161 (Tex. Crim. App. 1969).

[28]People v. Pantages, 212 Cal. 237, 297 P. 890 (1931).

[29]Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); People v. Currie, 14 Cal. App. 67, 111 P. 108 (1910); Harper v. State, 185 Ind. 322, 114 N.E. 4 (1916).

[30]People v. Russell, 241 Mich. 125, 216 N.W. 441 (1927).

[31]Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); People v. Boston, 309 Ill. 77, 139 N.E. 880 (1923); State v. Blackburn, 136 Iowa 743, 114 N.W. 531 (1908); Massey v. State, 447 S.W.2d 161 (Tex. Crim. App. 1969).

[32]People v. Kilfoil, 27 Cal. App. 29, 148 P. 812 (1915); Yates v. Commonwealth, 211 Ky. 629, 277 S.W. 995 (1925).

enter evidence accounting for the physical fact.[33] The circumstances of one of these cases were such that the jury knew of a pregnancy without its introduction,[34] and in the other case, the evidence of sexual conduct with a third party was also being offered for impeachment as the prosecutrix had testified that she had had no sexual relations with other persons.[35] It would seem then that the cases can be reconciled. The defendant ought not to be permitted to misuse this physical evidence rationale in order to enter otherwise inadmissible sexual history evidence; but if exclusion of such evidence would result in injustice to the defendant, it should be admitted.

A third circumstance in which previous intercourse or a reputation of unchastity might be relevant exists where want of chastity is an element of the crime to be proven by the state in a statutory rape prosecution.[36]

Finally, evidence of the victim's sexual activity has strong probative value if that activity tends to establish a motive for charging the defendant with rape. A Texas case, *Shoemaker v. State*,[37] illustrates such a circumstance. The rape victim had been upbraided by her sisters for her illicit relations with a particular man. She threatened her sisters with a rape charge against her

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[33]Parker v. State, 62 Tex. Crim. 64, 136 S.W. 453 (1911); State v. Slane, 48 Wyo. 1, 41 P.2d 269 (1935).

[34]State v. Slane, 48 Wyo. 1, 41 P.2d 269 (1935). The prosecutrix was a member of a small community which was well aware of her pregnancy. Furthermore, evidence was introduced at trial that the prosecutrix had taken certain medication which the jurors could have understood was designed to induce menstruation. Following the reasoning in this case, it would seem that if the witness on the stand were pregnant at the time of trial, and if the alleged rape incident could have accounted for the pregnancy, the defendant would be permitted to present evidence of other acts which could account for her obvious pregnancy even though the state had not actually introduced it into evidence.

[35]Parker v. State, 62 Tex. Crim. 64, 136 S.W. 453 (1911).

[36]*See, e.g.*, FLA. STAT. ANN. § 794.05 (Supp. 1975-76). The statute includes "of previous chaste character" as an element. Cases decided under such a statute require the state prove the victim's chastity. Deas v. State, 119 Fla. 839, 161 So. 729 (1935); Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920); Dallas v. State, 76 Fla. 358, 79 So. 690 (1918); Wright v. State, 199 So. 2d 321 (Fla. App. 1967). Apparently, according to an older case, People v. Mills, 94 Mich. 630, 54 N.W. 488 (1893), an 1887 Michigan statute required chastity as an element in statutory rape although the current statute does not. MICH. STAT. ANN. §§ 28.788(2)-(4) (Supp. 1975). In construing the former statute, the court in *Mills* found that a young woman who was still under the age of consent was considered "reformed" after six or seven years of chaste behavior so as to avail herself of statutory protection.

[37]58 Tex. Crim. 518, 126 S.W. 887 (1910). *See also* Packineau v. United States, 202 F.2d 681 (8th Cir. 1953) (the court reasoned that the victim might have been motivated to "cry rape" for her father's benefit).

brother-in-law if they did not cease their harassment. Subsequently, she did bring a charge of rape against her brother-in-law, and the court found evidence of her previous sexual conduct admissible at his trial.

2. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Arguably Relevant. —Traditionally, evidence of a woman's reputation for unchaste behavior has been admissible to show consent,[38] but such evidence may be limited to reputation testimony. The reason for so confining such evidence, rather than allowing the introduction of specific instances, was well stated in an 1895 Florida decision.

> The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indicator to warrant the conclusion that she would probably be guilty with another man who sought such favors with her.[39]

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[38]Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); Tully v. State, 69 Fla. 662, 68 So. 934 (1915); People v. Griffin, 76 Ill. App. 2d 326, 222 N.E.2d 179 (1966); Carney v. State, 118 Ind. 525, 21 N.E. 48 (1889); Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885).

[39]Rice v. State, 35 Fla. 236, 237, 17 So. 286, 287 (1895). The holding in a modern Georgia case, Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974), was that specific acts of prior sexual conduct with men other than the defendant could not be inquired into. This case has been criticized. *See* 8 GA. L. REV. 973 (1974). The student author argued that such a blanket exclusionary rule was ill-advised and too mechanistic to protect a defendant's rights in every situation. The court in *Lynn* had relied on state court precedent. Further, the author found the decision objectionable in that it did not weigh the probative value of the evidence against undue prejudice, confusion of the issues, consumption of time, and unfair surprise. Following *Lynn*, however, the Georgia Supreme Court declined to reevaluate its position. Relying on *Lynn*, the court in Price v. State, 233 Ga. 332, 211 S.E.2d 290 (1974), held that a question of whether the victim had lived continuously with her husband was improper.

Similarly, the Tenth Circuit Court of Appeals refused to accept the argument that one incident was in fact proof of a woman's poor reputation for chastity, holding that "testimony of unchastity on the part of the prosecutrix proffered by a witness to one claimed prior act of intercourse is not evidence of her reputation for unchastity." United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973). However, the defense in that case was alibi, and, therefore, the evidence to show consent was not of great value. *See also* Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); Tully v. State, 69 Fla. 662, 68 So. 934 (1951); Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); Thomas v. State, 249 So. 2d 510 (Fla. Ct. App. 1971); State v. McDonough, 104 Iowa 6, 73 N.W. 357 (1897); People v. McClean, 71 Mich. 309, 38 N.W. 917 (1888).

Other courts, nonetheless, have admitted testimony of both reputation and specific instances to show consent.[40]

The rationalizations supporting the admissibility of such evidence, whether by reputation or specific instances, leave much to be desired. Typical of such rationalizations is this quotation from a 1942 Arizona case:

> If consent be a defense to the charge, then certainly any evidence which reasonably tends to show consent is relevant and material, and common experience teaches us that the woman who had once departed from the paths of virtue is far more apt to consent to another lapse than is the one who had never stepped aside from that path.[41]

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[40]People v. Battilana, 52 Cal. App. 2d 685, 126 P.2d 923 (1942); People v. Burnette, 39 Cal. App. 2d 215, 102 P.2d 799 (1940); People v. Mangum, 31 Cal. App. 2d 374, 88 P.2d 207 (1939). *But see* Brown v. Commonwealth, 102 Ky. 227, 43 S.W. 214 (1897) (confining such instances to those shortly before the alleged crime). The courts in California have been careful not to admit evidence which is designed to create an image of loose womanhood in the mind of the jury unless it actually shows a reputation of unchastity or specific acts of intercourse. *See, e.g.*, People v. Newton, 139 Cal. App. 2d 289, 293 P.2d 476 (1956) (evidence of an "innocuous" episode the night before the rape); People v. Merrill, 104 Cal. App. 2d 257, 231 P.2d 573 (1951) (frequenting bars); People v. Burnette, 39 Cal. App. 2d 685, 126 P.2d 923 (1942) (employment in a questionable place); People v. Mangum, 31 Cal. App. 2d 374, 88 P.2d 207 (1939) (intoxication).

[41]State v. Wood, 59 Ariz. 48, 49-50, 122 P.2d 416, 418 (1942). This language could easily be dismissed as outmoded had the case not been cited in 1973. *See* State v. Kelley, 110 Ariz. 196, 197, 516 P.2d 569, 570 (1973). The *Kelley* case, however, took on an interesting twist in that the language from *Wood* was used to exclude further evidence of unchastity which had already been established. In that case, the defense had already proven four previous instances of intercourse between the prosecutrix and third parties. The court found further evidence to be merely cumulative. Once astray, the frequency of such straying was irrelevant. Other examples of language similar to that in the *Wood* case include the following:

> Under the law permitting a showing of previous unchastity by prosecuting witnesses in cases of rape by force, an assertion by such a witness that force was exerted and that she resisted it is in the nature of an assertion that she is a woman of chastity.

People v. Biescar, 97 Cal. App. 205, 211, 275 P. 851, 856 (1929).

> Her lack of chastity exerted an important influence upon this question [consent], for the rule is that it is inferable that a courtesan is more likely to consent than a pure woman.

Carney v. State, 118 Ind. 525, 526, 21 N.E. 48, 49 (1889). Evidence of general reputation and specific acts of intercourse were admissible to show consent

> based on the theory that a woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating a charge that force and violence were used against her in order to accomplish the rape.

People v. Walker, 150 Cal. App. 2d 594, 598-99, 310 P.2d 110, 115 (1957). Finally, in Indiana, a jury instruction was approved which explained the

Conversely one writer argued:

> Although character evidence is admitted on the issue of consent, its probative value is arguably low since the fact that a woman had consented to sexual relations with men in the past does not show that she has consented to intercourse with a particular man on a particular occasion. The probative value of character evidence on the issue of consent may also be outweighed by its prejudiciality to the victim. Such evidence should, in most cases, be excluded.[42]

Evidence showing consent to intercourse with a third party differs from evidence showing consent to previous intercourse with the defendant himself. In the latter case, the inference of consent is drawn from the fact that the victim's state of mind with respect to the defendant was known to be consensual at a given point in time, and the trier of fact might reasonably infer that the victim's state of mind had not changed. When the previous consensual intercourse was with someone other than the defendant, the victim's state of mind with respect to the defendant has not been established as consensual at any point in time. Both relations with the defendant and relations with a third party involve consent to intercourse at a particular time in the past. However, there is an argument to be made that the relations with the defendant are relevant and the relations with a third party are not relevant because of the unique and nontransferable nature of consent to sexual relations. The issue to be proven at trial is not that the victim consented to intercourse, but that she consented to intercourse *with the defendant.*

In the past, social codes of sexual conduct required that a woman never consent to intercourse with anyone other than her husband. In modern society, it is not taboo for a woman to have consented to sexual relations with more than one man in her lifetime. She is free to exercise her right to consent in a discriminatory manner. Because of such newly-found freedom, the identity of the particular man with whom she consented becomes more relevant.

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relevancy of chastity evidence as to credibility and commented on consent, allowing "that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste." Anderson v. State, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885).

[42]Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 345 (1973). This statement finds support in Alford v. United States, 282 U.S. 687, 694 (1931), where the Court said:

> There is a duty to protect him [or her, meaning the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him [her].

No longer may it be assumed that once a woman has consented to intercourse out of wedlock with one man she will be likely to do so with any number of men by virtue of the fact that she has flown in the face of a rigid moral tradition. Today a woman may consent in a discriminating manner with several men in her lifetime and not be outside the bounds of socially acceptable behavior. Therefore, since the woman who consents to relations with more than one man may be doing so in a discriminatory manner, her consent with a third party is not probative of her consent with the defendant. One cannot logically infer that because a woman has consented to intercourse with one man, she would consent with another.

However, habitual indiscriminate sexual conduct with strangers may be relevant to the issue of consent with the defendant. In such a case, the woman's conduct tends to prove that consent to intercourse for her has lost its unique and nontransferable character. In that instance, the evidence sought to be introduced is in the nature of habit evidence. The difficult question to be resolved is at what point the woman's sexual conduct becomes so nondiscriminatory as to constitute evidence that she is in the habit of consenting with almost anyone. It is unlikely that such a question may be answered by rigid formulations of numbers of previous consents and numbers of different men. More likely the question would be resolved by examining the particular pattern of previous consents in a given case. This is the kind of consideration which would be given the proffered evidence in an *in camera* admissibility hearing.

A recent Florida case, *Huffman v. State*,[43] found relevant the evidence of habitual illicit sexual conduct of the prosecutrix. *Huffman* was tried before the passage of the new rape shield law[44] in Florida, but the appeal took place after its passage. The Florida Court of Appeals set out a rule of relevance consistent with the new statute. In an attempt to construe older Florida cases which created an exception to the general reputation rule and allowed specific instances of intercourse to be proven in order to show "promiscuous intercourse with men,"[45] the court of appeals in *Huffman* held that

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[43]301 So. 2d 815 (Fla. Ct. App. 1974).

[44]FLA. STAT. ANN. § 794.022(2) (Supp. 1975-76).

[45]

> On a trial for rape, the character of the prosecutrix for chastity, or the want of it, is competent evidence as bearing upon the probability of her consent to the defendant's act, but the impeachment of her character in this respect must be confined to evidence of her general reputation, except that the prosecutrix may herself be interrogated as to her previous intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution.

Peterson v. State, 90 Fla. 361, 363, 106 So. 75, 75-76 (1925); *accord*, Rice v. State, 35 Fla. 236, 17 So. 286 (1895).

such language was to be read as allowing "evidence of illicit relations on the part of the prosecutrix sufficiently widespread to show a pattern of conduct which would bear on the issue of consent."[46] This holding seems designed, at least in part, to admit evidence of prostitution.[47]

The implication of such an admission, however, is not that a prostitute cannot be raped.[48] But, the practical impact upon the jury of admitting evidence of prostitution is likely to be devastating to the state absent some exceptionally clear indication of nonconsent. However, evidence of indiscriminate promiscuity bordering on habit does seem relevant where consent is at issue and the evidence of nonconsent is questionable.

Ordinarily, evidence of unchastity offered to show consent should not be admissible in a statutory rape case, consent not being at issue.[49] However, where the charge is statutory rape with force, the issue of consent being thus revived, unchastity evidence may be admissible.[50] Such evidence should meet the same test of relevance as in any forcible rape case where consent is at issue.

In some cases, sexual conduct evidence may also be relevant for impeachment purposes. If the prosecutrix has testified as to her chaste character, then it seems appropriate to allow the defense to impeach such testimony.[51] Even a constitutional shield must give way when it is used as a cover for perjury.[52] However, the character evidence introduced for impeachment sometimes is limited

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[46]301 So. 2d at 817.

[47]Prostitution may only be proved by reputation rather than by specific instances as in Florida. Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912). Failure to investigate the prosecutrix's reputation where the defendant claimed she was a "common streetwalker" was a factor in denial of effective counsel since under Virginia law consent bars a rape prosecution. Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

[48]Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973). The court in rejecting reputation evidence pointed out that:

> Even if it had been shown that prosecutrix was a prostitute, this would not have proved consent, or made her any the less the subject of rape by force. A prostitute does not lose the right of choice, and may consent or not consent according to her own will. The evidence shows that prosecutrix and appellant were on bad terms, and nothing in the record suggests that on this occasion any financial arrangements were made to obtain her consent, or that she otherwise consented.

Id. at 952; *accord*, Fite v. State, 139 Tex. Crim. 392, 140 S.W.2d 848 (1940). Indiana also recognizes that a common prostitute may be a victim of rape. Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885).

[49]See text accompanying note 58 *infra*.

[50]People v. Pantages, 212 Cal. 237, 297 P. 890 (1931).

[51]State v. Rivers, 82 Conn. 454, 74 A. 757 (1909).

[52]Harris v. New York, 401 U.S. 222 (1971).

to general reputation evidence.[53] If the alleged reputation for promiscuity is a topic explored in cross-examination, the courts in Arkansas have consistently held that the defense is bound by the prosecutrix's answers. They reason that no extrinsic evidence is admissible to impeach a witness on a collateral matter.[54]

3. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity Is Probably Irrelevant. —There are a number of instances in which admission of evidence of a victim's sexual conduct should be seriously questioned. These are situations in which prejudice to the victim probably outweighs any probative value the evidence may have. One such situation is admission of evidence to show consent where nonconsent is obvious. For example, some courts have recognized that strong evidence of force destroys the issue of consent sufficiently to render evidence of the prosecutrix's sexual history irrelevant. The use of a weapon or a confession that force was employed may obviate the issue of consent where the victim and rapist were strangers.[55] However, evidence of physical violence may not override admissibility of sexual history evidence where the victim and defendant were previously acquainted. In *Packineau v. United States*,[56] because the defendant and victim were not strangers, the majority showed little concern for the fact that the defendant's cohort had administered a stunning blow to the victim's jaw, causing the loss of two teeth. The dissenting judge, however, found this factor did obviate the issue of consent.

Evidence of the prosecutrix's previous sexual conduct should also not be admissible to show consent where consent is not at issue. Such cases are most often statutory rape cases. Similarily, some forcible rape cases, as a practical matter, do not hinge on a defense of consent, such as where the defendant denies the act of intercourse entirely and enters a plea of alibi.[57] Unless chastity of the

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[53]People v. McLean, 71 Mich. 309, 38 N.W. 917 (1888).

[54]Willis v. State, 220 Ark. 965, 251 S.W.2d 816 (1952); Waterman v. State, 202 Ark. 934, 154 S.W.2d 813 (1941); Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); Peters v. State, 103 Ark. 119, 146 S.W. 491 (1912); Plunkett v. State, 72 Ark. 409, 82 S.W. 845 (1904).

[55]In State v. Zaccardi, 280 Minn. 291, 159 N.W.2d 108 (1968), chastity evidence was inadmissible where the defendant had entered the victim's house at night, threatened her with a knife and tied her up. Similarly, in California such evidence was excluded because the rapist had used a knife and had confessed to the use of force. People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957).

[56]202 F.2d 681 (8th Cir. 1953).

[57]Two Texas cases emphasize that a prostitute can be raped, and, therefore, evidence of the victim's reputation as a prostitute is not admissible where the defendant denied having intercourse at all on that occasion.

prosecutrix is necessary to the maintenance of a statutory rape conviction, most courts reason that evidence of unchastity is not admissible in a statutory rape case to show consent, consent not being at issue.[58] In rejecting a claim that chastity evidence was relevant because the youthful prosecutrix was delinquent, the Indiana Supreme Court observed: "Delinquent or not, she was incapable of consenting to intercourse."[59] Some courts have been less doctrinaire in their approach. While specific acts may be excluded because consent is not at issue, general reputation evidence may be allowed.[60] The evidence may come in as relevant to the necessary quantum of corroboration;[61] it may be admitted to mitigate against a penalty;[62] or it may be used to attack the credibility of the witness.[63] With the exception of the credibility issue, there seems to be no independent justification for admission of chastity evidence in statutory rape cases. Why, for example, if consent is not at issue, should a defendant receive a less severe penalty for the statutory rape of a promiscuous girl than for one who is not promiscuous? Total exclusion of such evidence where consent is not at issue is a more defensible position.

Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973); Fite v. State, 139 Tex. Crim. 392, 140 S.W.2d 848 (1940). *See also* Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). However, a California court held that evidence of the victim's prior sexual conduct was admissible even though the defendant had denied having intercourse with the victim. Lack of consent, reasoned the court, was an element which the state had the burden of proving. People v. Degnen, 70 Cal. App. 567, 234 P. 129 (1925).

[58]People v. Hurlburt, 166 Cal. 2d 334, 333 P.2d 82 (1958); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); State v. Hammock, 18 Idaho 424, 110 P. 169 (1910); Douglas v. State, 234 Ind. 621, 130 N.E.2d 465 (1955); Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); People v. Eddy, 252 Mich. 340, 233 N.W. 336 (1930); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893); State v. Linton, 36 Wash. 2d 67, 216 P.2d 761 (1950); State v. Dorrough, 2 Wash. App. 820, 470 P.2d 230 (1970).

[59]Douglas v. State, 234 Ind. 621, 625, 130 N.E.2d 465, 467 (1955).

[60]People v. Walton, 6 Ill. App. 3d 17, 284 N.E.2d 508 (1972); State v. Speck, 202 Iowa 732, 210 N.W. 913 (1926).

[61]State v. Gee, 93 Idaho 636, 470 P.2d 296 (1970) (previous sexual conduct with the defendant).

[62]Vasquez v. State, 491 S.W.2d 173 (Tex. Crim. App. 1973); Keith v. State, 121 Tex. Crim. 508, 51 S.W.2d 603 (1931). Texas had bifurcated trials in such cases; chastity evidence was admissible at the penalty stage only.

[63]Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912). Some courts will not allow the prosecutrix to be questioned about previous sexual conduct in order to damage her credibility. People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); State v. Hammock, 18 Idaho 424, 110 P. 169 (1910); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893); State v. Linton, 36 Wash. 2d 67, 216 P.2d 761 (1950); State v. Dorrough, 2 Wash. App. 820, 470 P.2d 230 (1970).

Finally, the admissibility of sexual history evidence to damage the credibility of the victim is questionable. The rationale behind use of such evidence to affect credibility was articulated in an early Indiana instruction.

> This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, *upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character* . . . .[64]

Such a rationale is vulnerable. Indeed, courts which do admit such evidence to attack credibility may limit the evidence to reputation.[65] In denying admissibility of sexual conduct evidence to affect credibility, a California court countered the above logic with this statement:

> If this class of evidence was admissible as going to the credibility of the testimony of the prosecutrix in its entirety, then it would be equally admissible as against the veracity of any female who might be called upon to give evidence in a case. Yet no such principle is recognized anywhere . . . .[66]

One need only imagine a female witness to a traffic accident being asked about her previous sexual conduct to appreciate the import of the California court's statement. Accordingly, many courts do not subscribe to the doctrine that one of "bad moral character" sexually will also be untruthful.[67]

This overview reveals that the grounds for admissibility of this class of evidence fall along a continuum from most relevant to least relevant. While inquiry into a specific act with a third party to prove the source of physical evidence might be highly relevant and might in fact exonerate the defendant, a generalized besmearchment of the victim's character for no better reason than to attack her credibility does not measure up to relevancy requirements which ought to be imposed. No longer should we heed the Victorian rhetoric of older cases. It is not necessary to distinguish between "one who would prefer death to pollution, and another

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[64]Anderson v. State, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885) (emphasis added).

[65]Carney v. People, 118 Ind. 525, 21 N.E. 48 (1889); Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885); Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912).

[66]People v. Johnson, 106 Cal. 289, 294, 39 P. 622, 623 (1895).

[67]Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). *See also* cases cited note 63 *supra*.

who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex."[68] There now exists a wide range of sexual behavior between these two extremes. The contemporary woman values life too greatly to sacrifice it to "avoid pollution." Simplistic evidentiary rules are a luxury we can ill afford. A California court, in rejecting evidence of public intoxication as irrelevant to consent to intercourse, made the following observation:

> Suffice it to say, that we are permitted to take judicial knowledge of customs and the ordinary affairs of life. It must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that, in many respects, its application, as set forth in the earlier cases, would be a grotesque anachronism.[69]

Today courts must not only be permitted, but should be obliged, to examine offers of sexual history evidence in order to avoid grotesque anachronisms.

Once the court has determined at what point along that continuum of relevancy the particular offer of evidence falls, then, in applying the *Davis* test, the court should determine how much weight can be given the offer when balanced against the legitimate state interests in passing a rape shield law.

B. Legitimate State Interest in Exclusion of Sexual Conduct Evidence

The second step in application of the *Davis* test is inquiry into the legitimate state interest in passing a law shielding the prosecutrix from examination of her sexual history. The apparent interests at stake are twofold. First, the state may wish to protect the privacy of its citizenry and avoid unnecessary, embarassing inquiry into private matters. Secondly, by avoiding such embarrassment, passage of a rape shield law may encourage the reporting of rape and thus aid crime prevention.

These dual interests were espoused in *State v. Evjue,*[70] wherein the Wisconsin Supreme Court upheld the constitutionality of a statute penalizing newspapers, magazines, periodicals or circular publications for identifying a female who had been subjected to rape or other similar criminal assault. However, such statutes[71] were

[68]People v. Abbot, 19 Wend. 192, 195 (N.Y. 1838).

[69]People v. Mangum, 31 Cal. App. 2d 374, 382, 88 P.2d 207, 211 (1939).

[70]253 Wis. 146, 33 N.W.2d 305 (1948). *See also* Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (4th Cir. 1963).

[71]Four states have such laws: Florida, South Carolina, Wisconsin, and Georgia. *See* FLA. STAT. ANN. §§ 794.03-04 (1965); GA. CODE ANN. § 26-9901 (1972); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958).

deemed violative of the first amendment right to freedom of the press in a recent United States Supreme Court decision, *Cox Broadcasting Co. v. Cohn.*[72]

In *Cox*, the appellant, a reporter for a television station owned by Cox, was the defendant in an action for damages for invasion of privacy brought by the father of a deceased rape victim. The father was relying upon a Georgia statute.[73] The Court, in upholding first amendment rights over this statute, recognized that the rape victim's name had been obtained from a public record, the indictment. The Court suggested that if the states are to protect the privacy interests of their citizens, they must do so by avoiding public documentation. After *Cox*, it is difficult to assess the weight of the legitimate state interests espoused by the Wisconsin court in *Evjue*. The Court in *Cox*, although citing *Evjue*, did not address itself to the state interests articulated by the Wisconsin Supreme Court. At a minimum, it is apparent from *Cox* that such state interests are not paramount to first amendment rights. Whether or not such interests will triumph over admissibility of a particular offer of evidence of previous sexual conduct must depend upon how relevant that evidence is, that is how close it comes to the weight accorded the first amendment claim in *Cox*.

It is predictable that a rape shield law with a blanket prohibition against admissibility of any sexual conduct evidence would fall short of sixth amendment confrontation guarantees. Beyond that predictable result, each shield law should be examined to determine the type of evidence that is admissible and the procedure to be followed in order to effectuate state interests and protect the defendant's confrontation rights.

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[72] 420 U.S. 469 (1975).

[73]

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (1972). This statute is similar to the one which the Wisconsin court upheld in State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948).

V. Application of the *Davis* Test to the Indiana Rape Shield Law

The legitimate state interest in passing a rape shield law in Indiana is probably the same as in any other state.[74] Such an interest is a constant factor to be evaluated with each specific offer of evidence. Therefore, the question of whether the statute will conflict with the confrontation clause is one which depends for its answer upon the weight of the evidence which the statute admits. If the statute admits practically all prior sexual conduct evidence under one theory or another, the state purpose in passing that statute will be seriously undercut.[75] On the other hand, if the statute is so restrictive that it excludes evidence with a high degree of probative value, it will run afoul of the defendant's right to confrontation.

The Indiana statute[76] excludes opinion, reputation, and specific

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[74]*See* section IV, *B supra.*

[75]The Iowa statute may suffer from this defect as it appears to exclude very little. *See* Iowa Code Ann. § 782.4 (Supp. 1975-76). The California statute might be criticized for its special treatment of prior sexual conduct evidence offered to attack credibility. The admissibility of that category might function as a loophole through which evidence otherwise not admissible might be entered at trial. *See* Cal. Evid. Code §§ 782, 1103 (West Supp. 1975).

[76]Ind. Code §§ 35-1-32.5-1 to -4 (Burns Supp. 1975). Section 35-1-32.5-1 provides:

> In a prosecution for the crime of rape, sodomy, assault or assault and battery with intent to commit a felony (where the felony is rape, sodomy, or incest), incest, or assault and battery, where the offense involves removing, tearing, unbuttoning or attempting to remove, tear, unbutton or unfasten any clothing of any child who has not attained his or her seventeenth birthday, or fondling or caressing the body or any part thereof of such child with the intent to gratify the sexual desires or appetites of the offending person or, under circumstances which frighten, excite, or tend to frighten or excite such child, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct, and reputation evidence of the victim's past sexual conduct may not be admitted, nor may reference be made thereto in the presence of the jury, except as provided in this chapter.

(Citations omitted).

Section 35-1-32.5-2 provides:

> The following evidence proscribed in section 1 of this chapter may be introduced if the judge finds, pursuant to the procedure provided in section 3 of this chapter, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) evidence of the victim's past sexual conduct with the defendant; or
>
> (b) evidence which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded.

instance evidence of the victim's past sexual conduct unless the evidence is of past sexual conduct with the defendant or it shows that the act upon which the prosecution was founded was committed by someone other than the defendant. If the offer falls within one of those two categories, the trial judge will make an *in camera* determination of its admissibility by weighing its probative value against its inflammatory or prejudicial nature and deciding if it is material to a fact at issue in the case.

A. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Strong

Previous activity between the victim and the accused where consent is argued by the defense is specifically includable under the Indiana statute. In a statutory rape prosecution, the evidence of conduct between the victim and defendant could be excluded because it would not be relevant to a fact at issue. Acts of intercourse which may account for a physical fact in evidence could be admitted as tending to show that some person other than the defendant committed the act upon which the prosecution was

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(Citations omitted).

Section 35-1-32.5-3 provides:

> If the defendant proposes to offer evidence described in section 2 of this chapter, the following procedure must be followed:
>
> (a) the defendant shall file a written motion stating that the defense has an offer of proof concerning such evidence and its relevancy to the case not less than ten [10] days before trial;
>
> (b) the written motion shall be accompanied by an affidavit in which the offer of proof is stated; and
>
> (c) if the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury and at such hearing allow the questioning of the victim regarding the offer of proof made by the defendant.
>
> At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the victim is admissible under section 2 of this chapter, the court shall make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.
>
> If new information is discovered during the course of the trial that may make evidence described in section 2 of this chapter admissible, the judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under this chapter.

(Citations omitted).

Section 35-1-32.5-4 provides:

> This chapter does not limit the right of either the state or the accused to impeach credibility by showing of prior felony convictions.

(Citations omitted).

founded. Introduction of evidence to show want of chastity in a statutory rape case where that is an element to be proven by the state would be inapplicable in Indiana. Finally, the Indiana statute makes no provision for introduction of a victim's sexual activity tending to show motive for a particular charge of rape unless such evidence happens to be of a previous relation with the defendant or happens to prove that the act upon which the prosecution was based was committed by someone other than the defendant.

B. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Arguably Relevant

There is no provision for admission of evidence showing habitual sexual conduct with strangers. There is also no provision for admission of indiscriminate sexual relations with third parties unless such instances tend to prove the defendant did not commit the act upon which the prosecution was founded. Further, there is no provision under the Indiana statute for impeachment of the prosecutrix where she has taken the stand and testified as to her prudent sexual conduct.

C. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity Is Probably Irrelevant

There is nothing in the Indiana statute to exclude evidence of prior sexual conduct introduced to show consent where lack of consent is obvious so long as the instance is with the defendant or tends to show that the act upon which the prosecution was based was committed by someone other than the defendant. Therefore, even if there is strong evidence to show that the defendant used force to procure consent, this would not preclude the defense from entering evidence of previous relations between the defendant and the victim. Evidence of prior sexual conduct in a statutory rape case where consent is not at issue would be excluded as not being material to a fact at issue. Finally, the Indiana statute makes no provision for admission of prior sexual history evidence to impeach the victim's reputation for veracity.

D. Summary

The Indiana statute seems to suffer more from underinclusion than from overinclusion. It would probably be constitutionally impermissible to allow the statute to be used to exclude probative

motive evidence or impeachment evidence where the victim may have committed perjury. On the authority of *Davis*, however, the statute could be properly utilized. The statute in *Davis* was not declared unconstitutional but was merely set aside in order to protect the defendant's right to confrontation. *Davis* would permit the trial judge to set aside the restrictive provisions of the statute if in his *in camera* proceeding he found such provisions to violate the defendant's right to confrontation. In the long run, the success or failure of the statute depends upon its judicious use by trial judges.

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Remedies for Constitutional Torts: "Special Factors Counselling Hesitation"[1]

On November 26, 1965, federal agents, acting without probable cause, arrested Webster Bivens and searched his home and his person.[2] Mr. Bivens was without a remedy in federal courts until July 21, 1971, when the United States Supreme Court decided the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[3] holding that a violation of the fourth amendment prohibition of unreasonable searches and seizures[4] by a federal officer[5] gives rise to a tort action cognizable in federal courts. *Bivens* has been used frequently as a precedent in the ensuing years by plaintiffs seeking redress against federal officers for violations of many other constitutional provisions. An analysis of *Bivens* and its progeny reveals that certain constitutional provisions are now protected by a right to sue for tort damages in federal courts. The analysis also demonstrates that this right to sue for tort damages becomes unavailable when the courts are confronted with countervailing considerations which the Court in *Bivens* termed "special

[1]Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[2]*Id.* at 389 & n.1.

[3]403 U.S. 388 (1971). For more extensive discussions of the case, see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Note, *The Constitution as Positive Law*, 5 LOYOLA U. L.A.L. REV. 126 (1972); Note, *The Truly Constitutional Tort*, 33 U. PITT. L. REV. 271 (1971).

[4]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[5]The Court used the phrase "under color of his authority." 403 U.S. at 389. The Court thus adhered to the traditional concept that an agent of the government who acts unconstitutionally cannot be within the scope of his authority, since the government cannot authorize unconstitutional acts. *See, e.g.*, Pennoyer v. McConnaughy, 140 U.S. 1, 9-18 (1891); *In re* Ayres, 123 U.S. 443, 500-02 (1887). *See generally Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 837 (1957).

In Bell v. Hood, 327 U.S. 678 (1946), which presented a fact situation similar to *Bivens*, the issue of tort damages was not before the Court. On remand, the traditional concept was allowed to defeat recovery. The district court reasoned that only governmental activity gives rise to a constitutional violation; and, since federal officers violating the Constitution are beyond the scope of their authority, their acts are not the acts of the government and therefore cannot be unconstitutional. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). For a good analysis of the tortuous reasoning in this opinion, see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts*, 117 U. PA. L. REV. 1 (1968).

factors counselling hesitation."[6] It is these factors which this Note will attempt to identify and analyze.

I. Threshold Considerations

A. *Traditional Methods of Protecting Constitutional Interests*

Dean Prosser described a tort in evolutionary terms by his statement that "a wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages, although other remedies may also be available."[7] It is therefore possible to look upon *Bivens* as the final stage in the evolution of a new constitutional tort. Before *Bivens,* the federal courts had long recognized that activities violating the Constitution are wrongs,[8] but the courts had rarely recognized that the resulting harms could be compensated by money damages.[9] Money damages were awarded by state courts when the constitutional violations also resulted in common law torts,[10] but the state tort actions are intended to protect individuals from physical invasions of their persons or property, rather than invasions of their constitutional rights, and are therefore not wholly adequate to protect constitutional rights.[11] Congress created the first constitutional torts through enactment of a series of civil rights acts following ratification of the fourteenth amendment.[12] The Civil Rights Acts, however, apply only to violations of the Constitution by state officials;[13] when the same violations are com-

[6]403 U.S. at 396.

[7]W. Prosser, Handbook of the Law of Torts § 1, at 4 (4th ed. 1970) [hereinafter cited as Prosser].

[8]*See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

[9]Historically, judicial remedies against federal officers in the federal courts were equitable in nature. *See, e.g.*, Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936); United States v. Lee, 106 U.S. 196 (1882); Kelly v. Metropolitan County Bd. of Educ., 372 F. Supp. 528 (M.D. Tenn. 1973). However, where Congress had authorized money damages as compensation for fourth amendment violations, money damages were awarded. *See* West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884).

[10]Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). These suits were customarily removed to federal courts under 28 U.S.C. § 1442 (1970), which permits removal of civil suits against federal officers from state to federal courts. 403 U.S. at 391 & n.4.

[11]*See* notes 37-40 & accompanying text *infra*. *See generally* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

[12]42 U.S.C. §§ 1981-94 (1970).

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, *of any State or Territory*, subjects, or causes to be subjected, any citizen of the United States or other person within

mitted by federal officials, the Acts provide no remedies.[14]

B. The Constitution as an Independent Basis of Liability

A tort requires a plaintiff to have a legally protected right which, when invaded by the defendant, is compensable by money damages.[15] Common law courts at an early date established precedents for the use of statutes as a source of the plaintiff's right,[16] and the federal courts have on numerous occasions followed the common law tradition[17] by recognizing as torts activities which violate rights created by federal legislation.[18] However, on only two occasions before *Bivens* had the Court recognized as torts activities which violated rights defined in the Constitution.[19] Because of the

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> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970) (emphasis added).

[14]Roots v. Calahan, 475 F.2d 751 (5th Cir. 1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971).

[15]PROSSER § 1, at 4. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973).

[16]PROSSER § 36.

[17]*See* Katz, *supra* note 5, at 12-31.

[18]*Id.* at 31-33. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[19]Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900). Both cases were concerned with damages as a remedy for the denial of the right to vote in a congressional election. These cases had been considered in *Bivens* by the lower court as possible precedents for allowing a tort remedy for violations of the Constitution, but the Second Circuit Court of Appeals rejected the possibility because at the times when the suits were brought 42 U.S.C. § 1983 supplied a cause of action for the acts of the defendants. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 724 (2d Cir. 1969). However, this interpretation was untenable since the Supreme Court in *Wiley* explicitly refuted the contention that the court had no jurisdiction to allow a tort remedy under the general federal question grant of jurisdiction, 28 U.S.C. § 1331 (1970). 179 U.S. at 61-62. The Court in *Swafford* expressly overruled the lower court's dismissal of that suit on the basis of a lack of a federal question, using *Wiley* as a precedent. 185 U.S. at 491-92.

Justice Marshall, dissenting in a case subsequent to *Bivens*, indicated that in his view the impairment of the right to vote may be regarded as state action under section 1983 or alternatively as federal action since Congress has the ultimate authority over presidential elections, and that in the latter case constitutional violation of voting rights might be subject to an "implied remedy for a federal deprivation of constitutional rights." O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting).

One commentator has suggested that *Wiley* and *Swafford* may have been brought under the general federal question grant of jurisdiction rather than under section 1983 because the plaintiffs may have been unsure that the latter statute would apply in view of the Court's previous decisions in Carter v.

rarity of modern precedents for the use of the Constitution as the source of a plaintiff's right, the Court's use of the Constitution in *Bivens* was unusual. However, the use of the Constitution as the source of a plaintiff's right was only a minute departure from the traditional and more usual use of federal legislation as the source of a plaintiff's right.[20] The Court in *Bivens*, and other federal courts subsequently relying on *Bivens*, recognize constitutional torts in the same way and apply the same criteria that the federal courts have used for decades in recognizing torts from federal legislation.[21]

II. Criteria for Recognition of a Tort

A precondition to the recognition of a tort is a court with both jurisdiction and the power to fashion a remedy of money damages.[22] The Supreme Court held in *Bell v. Hood*,[23] a case with a fact situation remarkably similar to that of *Bivens*, that civil actions arising out of constitutional violations by federal officials is a proper subject for jurisdiction of federal courts under the general federal question grant of jurisdiction.[24] However, in *Bell* the question of fashioning a remedy was not before the Court; and on remand, the District Court for the Southern District of California declined to allow a tort remedy, although not on the basis of a lack of power

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Greenhow, 114 U.S. 317 (1884), and Minor v. Happerset, 88 U.S. (21 Wall.) 162 (1874). Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1125 n.74 (1969). *But see* Dellinger, *supra* note 3, at 1544 n.70.

The fifth amendment prohibition against taking of property without just compensation may be viewed as a constitutional mandate for compensatory damages. *See* Jacobs v. United States, 290 U.S. 13 (1933), wherein the Court stated:

> [The right to receive just compensation for the taking of land] rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

Id. at 16. For a more extensive discussion of fifth amendment "taking" cases, see *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 876-81 (1957).

[20] *See* notes 22-28 & accompanying text *infra*.

[21] *See* notes 29-36, 64-67 & accompanying text *infra*.

[22] *See* Dellinger, *supra* note 3, at 1540-43.

[23] 327 U.S. 678 (1946).

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> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

to fashion such a remedy.[25] The majority in *Bivens* did not discuss the Court's power to fashion a remedy, but chose to rely upon the fact that damages have historically been regarded as a customary remedy for invasions of personal interests and upon precedents established by previous cases in which the Court had awarded damages for violations of federal legislation.[26] However, the Court's decision in *Bivens* should put to rest any doubts regarding the power of the federal courts to fashion tort remedies for violations of the Constitution.

Armed with a grant of jurisdiction and the power to fashion a remedy of money damages, a court may allow a tort remedy in vindication of a legislatively or constitutionally defined right if it deems such action to be a proper exercise of its discretion. The question is then what criteria will be used by a court in determining whether the recognition of a tort is a proper exercise of its discretion. Criteria evolved through the tradition of judicial incorporation of legislatively defined standards of conduct into the common law of torts[27] are: (1) That the conduct which has injured the plaintiff has violated the rights of the plaintiff as defined by the legislation, (2) that judicial recognition of a tort will further the purpose of the legislation, and (3) that there is no evidence of any legislative intent to preclude a tort remedy.[28] When the Constitution is to serve as the basis of tort liability, the courts have thus far proceeded to use the same criteria. The difference is that the right which has been violated is found in the Constitution rather than in legislation, and the intent to preclude a tort remedy may be found in either the Constitution or in federal legislation.[29]

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[25]Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). The court dismissed for failure to state a claim upon which relief could be granted. *See* note 5 *supra*.

[26]403 U.S. at 395-96. Justice Harlan, in his concurring opinion, discussed the Court's power to recognize a tort from the Constitution. 403 U.S. at 402-06. Two members of the Court were of the opinion that the Court's recognition of a tort from the Constitution was an encroachment upon the legislative powers of Congress and thus an unconstitutional exercise of judicial power. 403 U.S. at 422 (Burger, C.J., dissenting); 403 U.S. at 428 (Black, J., dissenting).

[27]PROSSER § 36.

[28]*Id.* *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Turnstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Burke v. Campania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[29]The Court in *Bivens* stated, "For we have here no . . . congressional declaration that persons injured . . . may not recover money damages from the agents." 403 U.S. at 397. *Cf.* Dellinger, *supra* note 3, at 1547-48; Katz, *supra* note 5, at 43-44.

1. The Plaintiff's Right and the Defendant's Activities.—There are many cases defining rights conferred by the Constitution and many others defining activities which violate those rights. These cases have served as precedents in *Bivens* and its progeny for the recognition of constitutional torts.[30] The courts have therefore rarely found it necessary to delve anew into analyses of the Constitution in order to ascertain whether the Constitution has granted legally protected rights to the plaintiff or whether the acts of the defendant have violated those rights. However, a few cases have involved situations so unusual that the courts have had to decide whether the plaintiffs' alleged rights have been constitutionally defined and, if so, whether the activities of the defendants had violated those rights. In both *Gardels v. Murphy*[31] and *Smothers v. Columbia Broadcasting Systems, Inc.*,[32] the plaintiffs claimed first amendment violations by defendants who were not federal officials and sought to establish constitutional torts on a theory of "federal action" analogous to the state action theory used in constitutional tort suits brought under the Civil Rights Act.[33] In each case, the court necessarily had to determine whether the defendants were using a federal power and thus were violating the Constitution.

2. Furthering the Intent of the Constitution.—Before *Bivens* the Supreme Court had not been called upon to determine whether a tort remedy would further the purposes of a constitutional provision, although the Court had previously created the far more powerful remedy of the exclusionary rule[34] in furtherance of the Constitution. The Court in *Bivens* merely relied upon the accepted custom of awarding damages for the invasions of personal rights[35] and apparently proceeded upon the assumption that damages would further the intent of the Constitution.

The Court did, however, advance three persuasive bases to justify its departure from the traditional method of protection of constitutional rights through state common law torts. These were: (1) A recognition that one acting in the name of the federal

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[30]*See, e.g.*, Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973); Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972).

[31]377 F. Supp. 1389 (N.D. Ill. 1974).

[32]351 F. Supp. 622 (C.D. Cal. 1972).

[33]42 U.S.C. § 1983 (1970).

[34]The exclusionary rule prevents the use in a criminal trial of evidence gained in violation of the constitutional rights of the accused. It originated in Weeks v. United States, 232 U.S. 383 (1914), and was extended to state courts in Mapp v. Ohio, 367 U.S. 643 (1961).

[35]403 U.S. at 395.

government has the potential ability to bring about substantially greater harm than the ordinary citizen;[36] (2) a recognition that the fourth amendment protects interests different from those protected by state common law torts;[37] and (3) a recognition that state laws which coincidentally protect fourth amendment rights may operate inconsistently or even in a manner hostile to those rights.[38] These rationales support the hypothesis that the federal interest in enforcing constitutional rights is compelling enough to require the protection of those rights under federal laws administered in federal courts, rather than relegating those rights to the vagaries of state laws.[39]

The Supreme Court in *Bivens* rejected the Government's argument that a tort remedy for violation of the Constitution should be allowed only where the remedy is "indispensible for vindicating constitutional rights."[40] The Court looked upon money damages as an appropriate remedy for one whose rights had been violated, without requiring that the remedy be calculated to serve as a deterrent against future constitutional violations.[41] However, the situation in *Bivens* was one which tended to obliterate the distinction between a remedy which is merely "appropriate" and one which is "indispensible." Bivens had been arrested and searched without probable cause.[42] An injunction against further actions of the defendants would not have been helpful, since no future invasions of the plaintiff's interests were threatened.[43] The exclusionary rule would have been of no use, since the plaintiff was not charged with a crime.[44] In Justice Harlan's words, "For people in Bivens' shoes, it is damages or nothing."[45] One might conclude that in such circumstances a tort remedy would have been indispensible, rather than merely appropriate. Two subsequent cases in lower federal courts sufficiently differ from *Bivens* to serve as good illustrations of the distinctions between appropriate and indispensible remedies.

Sparrow v. Goodman[46] was a class action against Secret Service agents in charge of security for President Nixon. Members of the class were individuals entitled to be present at public meetings

[36] *Id.* at 392.

[37] *Id.* at 392-94.

[38] *Id.* at 394.

[39] *Cf.* Hill, *The Law-Making Power of Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1025, 1028-29 (1967).

[40] 403 U.S. at 397.

[41] *Id.* at 407-08 (Harlan, J., concurring).

[42] *Id.* at 389 & n.1.

[43] *Id.* at 410 (Harlan, J., concurring).

[44] *Id.*

[45] *Id.*

[46] 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom.* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

at which the President was expected to be present and who were excluded from the audience because of the defendants' arbitrary decisions based upon the plaintiffs' manner of dress, hair styles, and leaflets and placards. The court found that the defendants had violated the plaintiffs' rights under the first, fourth, and fifth amendments, and that damages were an appropriate remedy for those violations. The court also enjoined the Secret Service from future arbitrary exclusions of citizens from public meetings attended by the President. The court recognized that the injunction would probably not prove useful to those members of the plaintiff class immediately before the court since the President would probably not make another public appearance in the same locality in the near future, but the court also recognized that the injunction would benefit members of the class in other cities at which the President would speak.

VonderAhe v. Howland[47] was an action by a dentist against Internal Revenue Service agents who had seized the plaintiff's financial and patient treatment records under an overly broad search warrant. The plaintiff sought suppression of the records in any subsequent criminal proceedings, return of the records, and damages for loss of income allegedly suffered as the result of the seizure of the patient treatment records. The Ninth Circuit Court of Appeals, remanding the case to the district court with directions to suppress the evidence and return the records, stated: "Insofar as the complaint seeks damages because of the Agents' acts, the serious pecuniary loss caused thereby would appear to bring this case within the *Bivens* doctrine."[48]

In both *Sparrow* and *VonderAhe*, the injunctions illustrate remedies which may be classified as "indispensible" since they are calculated to deter further invasions of constitutional rights by federal officers. The tort damages illustrate remedies which may be classified as "appropriate" since they compensate the plaintiffs for damages suffered as a result of the violations but are not particularly calculated to prevent future constitutional torts.

The Court's opinion in *Bivens* was written narrowly in terms of the fourth amendment right to be free of unreasonable searches and seizures, and subsequent majority opinions of the Court continue to refer to *Bivens* in the same context.[49] However, a fair reading of the opinion leads to the conclusion that the rationale of *Bivens* will readily support the recognition of tort actions for violations of other constitutionally protected rights. This conclusion

[47]508 F.2d 364 (9th Cir. 1974).

[48]*Id.* at 372.

[49]United States v. Calendra, 414 U.S. 338, 354 n.10 (1974); District of Columbia v. Carter, 409 U.S. 418, 432-33 (1973).

is supported by statements found in post-*Bivens* dissenting and concurring opinions of members of the Court[50] and by the decisions of lower federal courts using *Bivens* as a precedent for allowing tort actions in vindication of rights conferred by the first,[51] fifth,[52] sixth,[53] eighth,[54] ninth,[55] tenth,[56] and fourteenth[57] amendments.

The Court's concept, elucidated in *Bivens*, that state common law torts are inadequate to protect constitutional rights is particularly applicable in situations involving constitutional provisions other than the fourth amendment. In the ordinary case of search and seizure, there is a restraint or a taking of the plaintiff's person or physical property which creates at least a potential for recovery under common law torts. This, however, may not be true in other situations. The first amendment rights of freedom of

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[50]City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan & Marshall, JJ., concurring) (alleged due process violation by a municipality); O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting) (alleged violation of the right to vote in a political party's convention for choice of candidate for President of the United States).

[51]Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973); Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972) (by implication). *Contra,* Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974); Smothers v. Columbia Broadcasting Sys., Inc., 351 F. Supp. 622 (C.D. Cal. 1972).

[52]Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971); Jackson v. Wise, 385 F. Supp. 1159 (D. Utah 1974) (by implication); United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974); Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973); Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973); Scheunemann v. United States, 358 F. Supp. 875 (N.D. Ill. 1973); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973) (dictum); Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972). *Contra,* Archuleta v. Calloway, 385 F. Supp. 384 (D. Colo. 1974); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972); Smothers v. Columbia Broadcasting Sys., Inc., 351 F. Supp. 622 (C.D. Cal. 1972).

[53]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974).

[54]Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973) (dictum).

[55]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974); Howard v. Warden, 348 F. Supp. 1024 (E.D. Va. 1972).

[56]Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974).

[57]Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Manos v. City of Green Bay, 372 F. Supp. 40 (E.D. Wis. 1974) (by implication). *Contra,* Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974).

speech, assembly, and petition for redress of grievances[58] offer particularly good examples of rights which may be violated without physical acts upon the plaintiff's person or property. First amendment rights may be infringed when citizens merely obey the commands of federal officials to be silent or to depart from a place of assembly.[59] First amendment rights also may be infringed when citizens peacefully acquiesce to a federal official's refusal to allow the citizens to join a public gathering because they are carrying leaflets or placards.[60] The rights are lost in these situations because citizens have lost their opportunities to exercise their first amendment rights;[61] yet, because there has been no physical restraint or injury to the citizens or to their property, no state common law torts will allow them compensation.[62] If there is no constitutional tort, the injured citizens will have no remedy; if there is no remedy, there is no way to further the purpose of the Constitution.[63]

3. The Absence of Negative Intent.—Once the courts have satisfied themselves that a constitutional tort has occurred and that a tort remedy would further the purposes of the Constitution, they must then determine whether there is any evidence of an intent to preclude a tort remedy. This intent may be found in the Constitution[64] or in statutes.[65] The presence of negative intent will preclude the recognition of a tort[66] and may therefore be the most

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> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[59]Sparrow v. Goodman, 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom.* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

[60]*Id.*

[61]Butler v. United States, 365 F. Supp. 1035, 1040 (D. Hawaii, 1973).

[62]*Id.* at 1044.

[63]Chief Justice Burger, dissenting in *Bivens*, conceded the necessity of a remedy for constitutional violations. He said:

> I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. . . . This is illustrated by the paradox that an unlawful act against a totally innocent person . . . has been left without an effective remedy, and hence the Court finds it necessary now . . . to construct a remedy of its own.

403 U.S. at 415-16 (Burger, C.J., dissenting).

[64]*See* notes 150-172 & accompanying text *infra.*

[65]403 U.S. at 397.

[66]The presence of negative intent may be found when the statute creates a complex regulatory scheme which, in the opinion of the court, would be destroyed by allowing tort remedies. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458-61 (1973).

important of the "special factors counselling hesitation" in the recognition of a tort based on the infringement of a constitutional right. In the absence of any evidence of an intent to preclude a tort remedy, the traditional approach of the courts is that "[a] disregard of the command is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of common law . . . . This is but an application of the maxim, *Ubi jus ibi remedium.*"[67]

Courts at times apply a more stringent requirement of evidence of an affirmative legislative intent to allow a tort remedy for violation of a statute.[68] The application of the more stringent requirement is probably a court's response to the presence of special factors counselling hesitation in the case at bar rather than an automatic application of a rule of law.[69] The recent case of *Breitwieser v. KMS Industries, Inc.*[70] may serve as an illustration of this point.

Breitwieser was, in essence, a state wrongful death action, but the plaintiff sought to obtain a tort remedy in federal court on the theory that the death of his son had occurred while the son was employed by the defendant in violation of the Fair Labor Standards Act.[71] The Act prohibits the employment of minors in the operation of heavy equipment, and the decedent had been a minor whose death occurred while he was operating a fork-lift truck. The decedent was also covered by the Georgia Workmen's Compensation Act, which gave the plaintiff an automatic right to recovery but explicitly excluded recovery under the state wrongful death laws.[72] Allowing recovery under federal legislation would therefore have been in derogation of a strong state policy explicitly expressed in the state Workmen's Compensation Act. The existence of the state legislation and the absence of any federal legislation specifically allowing a tort action may well have been deemed to have been special factors counselling hesitation, therefore re-

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[67]Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916).

[68]*See, e.g.*, Breitwieser v. KMS Indus., Inc., 467 F.2d 1391, 1394 (5th Cir. 1972); Chavez v. Freshpict Foods, Inc., 465 F.2d 890, 894 (10th Cir.), *cert. dismissed*, 409 U.S. 1042 (1972). *See generally* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes*, 43 FORDHAM L. REV. 441 (1974).

[69]The origin of the requirement may have been a statement in Wheeldin v. Wheeler, 373 U.S. 647, 650 (1965). *See* Comment, *A Civil Cause of Action May Be Implied Under the Federal Corrupt Practices Act*, 6 RUTGERS CAMDEN L.J. 453 (1974).

[70]467 F.2d 1391 (5th Cir. 1972).

[71]29 U.S.C. § 212 (1970).

[72]GA. CODE ANN. § 114-103 (1973).

quiring the application of the more stringent requirement of an affirmative legislative intent to allow a tort remedy for violation of a statute.

In a situation such as *Breitwieser,* the more stringent requirement is reasonable and not inconsistent with the ordinary requirement of the mere absence of an intent to preclude a tort remedy. In recognizing a tort, the courts apply their remedial powers to further the intent of the Constitution or federal legislation. The application of the usual standard leaves the courts free to further that intent through a variety of remedial mechanisms available to the courts. The use of a more stringent standard when faced with special factors counselling hesitation leaves the remedial powers of the courts intact; the courts may thus allow a tort remedy if the requirement of affirmative intent is satisfied, or the courts may allow other remedies if the requirement is not satisfied.[73]

The Court in *Bivens* did not discuss the possibility of an intent to preclude a tort remedy for vindication of constitutionally protected interests.[74] Justice Harlan, in his concurring opinion, did point out that the history of the Bill of Rights appears to indicate that the constitutional authors assumed that state common law remedies would be sufficient to protect the Bill of Rights guarantees.[75] However, it does not follow that the authors did not intend to allow an independent constitutional tort remedy should one become necessary. The post-*Bivens* cases discussing the evidence of negative intent have all done so in the context of the vicarious liability of state-created governmental entities,[76] and the discussions have not dealt with evidence of negative intent found in the Bill of Rights. In these cases, evidence of negative intent has been found either in other constitutional provisions or in legislation; and when negative intent has been found, recovery has been denied.[77]

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[73]*See, e.g.*, United Farmworkers Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974).

[74]Justice Black found evidence of legislative intent to preclude a tort remedy.

> Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials.

403 U.S. at 429 (Black, J., dissenting).

[75]*Id.* at 400-01 n.3.

[76]*See* notes 95-131 & accompanying text *infra.*

[77]*See* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974); Payne v. Mertens, 343 F. Supp. 1355 (N.D. Cal. 1972).

III. Special Factors Counselling Hesitation

A. Comity: The Effect of State Laws

If a court finds that the elements of a constitutional tort are present and that there is no evidence of intent to preclude a tort remedy, the court must then search for the presence of any special factors counselling hesitation. Considerations of comity[78] have sometimes counselled hesitation in cases seeking to recognize torts based upon federal legislation. Because of comity, the availability or adequacy of state law remedies[79] have militated against the judicial creation of a federal remedy[80] unless the federal interest in the subject has been so compelling as to demand a federal remedy.[81]

In view of the extensive explanation by the Supreme Court in *Bivens* that the fourth amendment operates independently of any state laws which may coincidentally protect the same interests,[82] one must conclude that comity is no longer very important in constitutional tort actions against federal officers. Significantly, in post-*Bivens* actions against federal officers, the courts have not mentioned state laws unless the court has been asked to exercise pendent jurisdiction over a state law claim.[83] There is simply no need to discuss state law remedies when "[a]s in *Bivens:* A common law or state tort remedy may or may not afford a means of redressing [a] wrong, but in any case, will not be

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[78] Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others. . . . Comity persuades, but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided.

Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

[79] *Compare* Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973), *with* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[80] *See generally* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes*, 43 Fordham L. Rev. 441 (1974); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 292-94 (1963).

[81] *Cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (federal interest in regulating sale of securities); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal interest in commercial paper issued by the Federal Government); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) (federal interest in regulating interstate communications); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (federal interest in protecting citizens from discriminatory practices by interstate carriers). *See generally* Hill, *supra* note 39.

[82] 403 U.S. at 392-95.

[83] *Cf.* Butler v. United States, 365 F. Supp. 1035 (D. Hawaii, 1973).

tailored specifically to cases of lawlessness pursuant to federal authority . . . ."[84]

Considerations of comity are still viable, however, in cases involving a state-created governmental entity as a defendant. One federal court has specifically stated that it would not allow a constitutional tort remedy against such a defendant because of "considerations of comity and federalism."[85] Others, conversely, have used comity as a means of allowing recovery.[86] These courts have incorporated state laws waiving immunity of state-created governmental entities into the federal law of constitutional torts. If the state in which the court sits has waived immunity to tort suits, tort damages are allowed;[87] if not, the damages are not allowed.[88]

The fact that federal jurisdiction over constitutional tort suits has been predicated upon 28 U.S.C. § 1331,[89] the general federal question grant of jurisdiction, was discussed previously.[90] Federal courts may apply the laws of the state in which they sit to suits predicated upon section 1331 if they "see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect . . . ."[91] These special reasons are, of course, very frequently reasons of comity, and have in the past been disregarded when the courts have deemed the subject matter of a case to be of compelling federal interest requiring uniform federal laws.[92] Surely *Bivens* can be interpreted to indicate a compelling

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[84]States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974).

[85]Perzanowski v. Salvio, 369 F. Supp. 223, 230 (D. Conn. 1974).

[86]*See* Skehan v. Board of Trustees, 501 F.2d 31, 42-43 (3d Cir. 1974). *Cf.* Manos v. City of Green Bay, 372 F. Supp. 40 (E.D. Wis. 1974) (by implication).

[87]*See* cases cited note 86 *supra.*

[88]*Id.*

[89]28 U.S.C. § 1331 (1970). Federal officers cannot be sued for constitutional torts under the Civil Rights Act, 42 U.S.C. § 1983 (1970), because they are not acting under color of state law, as required by that Act. *See* note 13 & accompanying text *supra. See, e.g.*, District of Columbia v. Carter, 409 U.S. 418 (1973); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 n.1 (1971); Roots v. Callahan, 475 F.2d 751 (5th Cir. 1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

Counties and municipalities cannot be sued under section 1983 because they are not persons within the meaning of that section. *See* notes 126-131 & accompanying text *infra.* These defendants may be sued for constitutional torts under the diversity grant of jurisdiction, 28 U.S.C. § 1332 (1970), if they are amenable to suit according to the law of their own state. Moor v. County of Alameda, 411 U.S. 693, 717-22 (1973).

[90]*See* notes 23-24 & accompanying text *supra.*

[91]D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471 (1942).

[92]*See, e.g.*, cases cited note 81 *supra. See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 60 (2d ed. 1970); Hill, *supra* note 39.

federal interest in enforcing federal constitutional rights. The courts would then be justified in disregarding state laws which would impact either positively or negatively upon the federal rights.[93]

The federal courts' recognition of the state laws of immunity for state-created governmental entities simply cannot be interpreted as an indication of a lack of a compelling federal interest in the enforcement of federal constitutional rights. When one considers the application to the states of the more powerful remedy of the exclusionary rule,[94] the fallacy of such an interpretation is obvious. The continued application of state laws in suits against state-created governmental entities must therefore indicate the presence of special factors counselling hesitation, which are found in federal laws.

B. The Effect of Federal Laws

Before *Bivens,* lower federal courts accepted jurisdiction over state-created governmental entities under section 1331,[95] but it was commonly believed that the only relief which federal courts could grant against these defendants for violation of the Constitution was injunctive[96] because violation of the Constitution was not considered a tort.[97] Neither the language[98] nor the history[99] of section 1331 supports the conclusion that the federal courts lack jurisdiction over constitutional tort suits against state-created governmental entities under that statute. However, in *Perzanowski v. Salvio,*[100] the pre-*Bivens* case law of section 1331 was construed to limit the discretion of the court to allow a constitutional tort suit against a city.

The Supreme Court has not had occasion to consider whether tort damages may be awarded in cases in which a state-created

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[93]Sullivan v. Murphy, 478 F.2d 938, 972 (D.C. Cir. 1973).

[94]Mapp v. Ohio, 367 U.S. 643 (1961).

[95]*See, e.g.,* Bennett v. Gravelle, 323 F. Supp. 203 (D. Md.), *aff'd,* 451 F.2d 1011 (4th Cir. 1971), *petition for cert. dismissed,* 407 U.S. 917 (1972); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

[96]*See* cases cited note 95 *supra.*

[97]This rationale was based on the decision in Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). See note 5 *supra.*

[98]

> The district courts shall have original jurisdiction of all civil actions, wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

[99]*See* notes 132-140 & accompanying text *infra.*

[100]369 F. Supp. 223 (D. Conn. 1974).

governmental entity is a defendant.[101] In *Illinois v. City of Milwaukee*,[102] the Court held the city and local sewage commission to be proper defendants in a tort action based upon federal legislation in which jurisdiction was based upon section 1331, and in *City of Kenosha v. Bruno*,[103] the Court implicitly recognized that a municipality was amenable to a constitutional tort suit where jurisdiction was based upon section 1331.[104] Both of these cases, however, presented only a question of equitable relief; compensatory damages were not at issue. State-created lesser governmental entities therefore may be proper defendants in constitutional tort suits under section 1331; however, in view of the absence of a definitive statement by the Court that tort remedies can be allowed against these defendants, the pre-*Bivens* case law of section 1331 may continue to be deemed a special factor counselling hesitation.

Some federal courts have also denied constitutional tort remedies against state-created governmental entities because of the courts' interpretations of the eleventh amendment.[105] The eleventh amendment[106] gives the states the right to complete immunity from suit in federal court by their own citizens[107] or the citizens of another state. This immunity may be waived by a state, either through consent or through voluntary participation in an activity not within the sphere of the state's governmental functions.[108] However, the Court established at an early date that this immunity to suit does not generally extend to governmental entities created by the states.[109] The immunity will apply if such entities are merely the

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[101] *Cf.* United Farmworkers Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974).

[102] 406 U.S. 91 (1972).

[103] 412 U.S. 507 (1973).

[104] The Court remanded the case to the district court for a consideration of jurisdiction under section 1331. 412 U.S. at 515. Justices Brennan and Marshall, concurring in the opinion, stated, "If appellees can prove their allegations that at least $10,000 is in controversy, then § 1331 jurisdiction is available . . . ." *Id.* at 516 (Brennan, J., concurring).

[105] Perzanowski v. Salvio, 369 F. Supp. 223, 230-31 (D. Conn. 1974); Washington v. Brantley, 352 F. Supp. 559, 564-65 (M.D. Fla. 1972).

[106]

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

[107] Hans v. Louisiana, 134 U.S. 1 (1890); *In re* Ayres, 123 U.S. 443 (1887).

[108] *Compare* Parden v. Terminal Ry., 377 U.S. 184 (1964), *and* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), *with* Edelman v. Jordan, 415 U.S. 651 (1974).

[109] Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911); Chicot County v. Sherwood, 148 U.S. 529 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868).

arms or alter egos of the states[110] and a judgment against the entity will result in the payment of compensatory damages from state funds.[111]

The history of the eleventh amendment reveals that it was intended to maintain the sovereign immunity of the states in a manner consistent with the federal system[112] and to protect the states' financial resources.[113] The recent decision in *Edelman v. Jordan*[114] reveals that the Court continues to adhere to these principles. In *Edelman,* officials of the Illinois Department of Public Aid were sued under 42 U.S.C. § 1983[115] for enforcing a state regulation which conflicted with a federal social security regulation. The plaintiffs alleged deprivation of property without due process, in violation of the fourteenth amendment.[116] The property involved was the right to welfare benefits to which the plaintiffs were entitled under federal legislation.[117] The plaintiffs were therefore asserting federal rights based upon both federal legislation and the Constitution. The Court allowed injunctive relief, but refused an award of back payments, which the Court termed "a form of compensatory damages,"[118] because the funds would have been paid from state resources. The Court distinguished past cases which had allowed tort remedies for violation of rights created by federal legislation from *Edelman* on the basis of the eleventh amendment.[119] The Court further held that suits against state officials under section 1983 are limited by the eleventh amendment[120] and noted that a state's abolition of its immunity to suit in its own courts is not a determination that the state has relinquished its eleventh amendment immunity to suit in federal courts.[121]

Following *Edelman,* the Third Circuit Court of Appeals had occasion to consider the eleventh amendment immunity of a state-

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[110]State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929).

[111]Edelman v. Jordan, 415 U.S. 651, 668 (1974).

[112]Mathis, *The Eleventh Amendment: Adoption and Interpretation,* 2 GA. L. REV. 207, 215-30 (1968).

[113]*Id.*

[114]415 U.S. 651 (1974).

[115]42 U.S.C. § 1983 (1970).

[116]

> No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

[117]42 U.S.C. §§ 1382-85 (1970).

[118]415 U.S. at 668.

[119]*Id.* at 673-74.

[120]*Id.* at 677.

[121]*Id.* at 677 n.19.

created governmental entity in *Skehan v. Board of Trustees*,[122] a constitutional tort suit in which a college professor sought reinstatement and back pay as a remedy for dismissal in violation of the fourteenth amendment. The Third Circuit first established that the state had abolished immunity of state-created governmental entities and that the federal courts have jurisdiction under section 1331 to allow tort remedies against state-created governmental entities.[123] The court then pointed out that since the tort remedy is limited by the eleventh amendment, retrospective relief could be allowed only if the defendant was found on remand to be a separate, subsidiary governmental unit[124] and that the funds for payment of damages would be derived from separate college funds rather than from state funds.

The approach of *Edelman* is probably the most reasonable solution to the problem of the vicarious liability of state-created governmental entities for the constitutional torts of their employees. The *Edelman* solution is consistent with the language, history, and judicial construction of both the eleventh amendment and section 1331. The solution accommodates the federal interest in protecting constitutionally defined rights of both individuals and the states; and the solution recognizes the practicality of the situation, since a state which has waived the immunity of its lesser governmental entities will probably also have provided protection against financial judgments through the medium of insurance. The *Edelman* solution therefore violates neither the law nor its purpose.

The concept that section 1983 and its accompanying grant of jurisdiction, 28 U.S.C. § 1343,[125] limit the jurisdiction of federal courts in actions predicated upon section 1331 is another facet of the courts' concern with the basic principles of the eleventh amendment.[126] This concept has been the rationale for refusing to allow tort remedies against state-created governmental entities in several post-*Bivens* cases.[127] An examination of the concept reveals that it is not the result of any substantive law; rather, the concept is a result of the fact that both sections 1331 and 1983 are bases for constitutional tort suits and that both statutes were passed within a few years of each other.

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[122]501 F.2d 31 (3d Cir. 1974).

[123]*Id.* at 41, 44.

[124]*Id.* at 42-43.

[125]28 U.S.C. § 1343 (1970).

[126]*See* notes 112-113 & accompanying text *supra*.

[127]Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377-78 (W.D. Pa. 1974); Perzanowski v. Salvio, 369 F. Supp. 223, 230 (D. Conn. 1974); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972), *implicitly overruled in* Dahl v. City of Palo Alto, 372 F. Supp. 647, 649-51 (N.D. Cal. 1974).

Although some state-created governmental entities have been held to be persons within the meaning of section 1983,[128] the Supreme Court has held that municipalities[129] and counties[130] are not. Consequently, federal courts do not have original jurisdiction over these defendants under section 1983's grant of jurisdiction, section 1343. The Court's decisions have rested upon its analyses of the history of sections 1983 and 1343, which have revealed a congressional intent not to allow state-created governmental entities to be held vicariously liable for the constitutional torts of their agents.[131]

In *Lynch v. Household Finance Corp.*,[132] the Court had occasion to consider the relationship between civil rights cases arising under section 1983 and those arising under section 1331. The Court pointed out that while there are similarities because the subject matter of both classes of cases may be the same, the grants of jurisdiction are different because they stem from different congressional enactments.[133] Section 1343 was a part of the Civil Rights Act of 1871,[134] but section 1331 was enacted in 1875 as part of an amendment of the removal grant of jurisdiction.[135] Therefore the focus of congressional attention was in the first instance upon the fourteenth amendment, and in the other upon article III, sections 1 and 2 of the Constitution.[136] The Court's examination of the sketchy legislative history of section 1331[137] revealed no indication

[128]*See* McCormack, *Federalism & Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 34-36 (1974).

[129]City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

[130]Moor v. County of Alameda, 411 U.S. 693 (1973).

[131]City of Kenosha v. Bruno, 412 U.S. 507, 512 (1973); Moor v. County of Alameda, 411 U.S. 693, 704-10 (1973); Monroe v. Pape, 365 U.S. 167, 188-92 (1961).

[132]405 U.S. 538 (1972).

[133]*Id.* at 543-48.

[134]Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The Act was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

[135]Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. The Act was entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

[136]

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U.S. CONST. art. III, §§ 1, 2.

[137]405 U.S. at 548. For the history of the statute, the Court relied partially upon Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942).

of any congressional concern with any class of defendants at the time of enactment;[138] rather, the concern was with subject matter jurisdiction.[139] The Court also found that section 1331 was a part of a trend of expanding national authority over matters formerly left to the states.[140]

Sections 1983 and 1343 were enacted for one purpose, and section 1331 for another, at different times and by different Congresses. It does not follow that one section should limit the other, merely because both may serve as jurisdictional bases for cases involving the same constitutional questions. Although the proximity of the dates of passage of the two laws may be evidence that Congress would have limited section 1331 to conform with sections 1983 and 1343 if the matter had been discussed, the evidence is surely not sufficient to allow a determinative decision.[141] The better view is probably that those courts which hold sections 1983 and 1343 to be special factors counselling hesitation are expressing concern for the limitations on suits against the states imposed by the eleventh amendment.

When federal officers are defendants in constitutional tort suits, there is of course nothing in section 1331, the eleventh amendment, or section 1983 which counsels hesitation. Instead, judicial conviction that federal officers should be governed by the same rules which federal courts have previously applied to state officers has been a persuasive force in forming the scope of constitutional torts.[142] Federal case law requiring states to hold evidentiary hearings to comply with the due process clause of the fourteenth amendment have been influential in defining those activities of federal officers which constitute a violation of the due process clause of the fifth amendment.[143] Similarly, federal laws previously applied to state officers under section 1983 have been influential in defining activities which constitute constitutional

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[138]405 U.S. at 548.

[139]*Id.*

[140]*Id.*

[141]*See* Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1973).

[142]*See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971).

[143]States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974). This was a constitutional tort suit brought by a ship's charterer against the Secretary of the Treasury, the District Director of the Customs Service, and agents of the Customs Service for violation of the fifth amendment prohibition of the taking of property without due process. The court said,

> [I]t would be incongruous indeed if the federal government were left completely unrestrained under the identical wording of the Fifth Amendment following the seizure of goods by customs officers.

Id. at 1154.

torts,[144] the scope of immunity of the officers,[145] the defenses available to them,[146] and the damages for which they are liable.[147] To a great extent, therefore, the federal case law of constitutional torts applied to state officials may be said to counsel affirmation rather than hesitation.

However, in some constitutional tort suits against federal officials, courts have deemed the tasks of certain defendants so distinguishable from those of state officials as to destroy the analogy with cases involving state officials. The courts have then ignored the precedent of federal case law applied to state officials. One such case was *Galella v. Onassis*,[148] in which Secret Service agents protecting John Kennedy, Jr., were sued for false arrest and malicious prosecution by a free-lance photographer whom the defendants had apprehended for jumping into the path of John Kennedy, Jr., while he was playing in a public park. The court found that the defendants were immune from the suit because their duties required an instant decision, unlike ordinary law enforcement officers who have time for reflection before making an arrest.[149] The circumstances of the case were therefore deemed to be so different from the ordinary constitutional tort situation that federal laws ordinarily applied to state or federal law enforcement agents could not be applied to the defendants.

Provisions of the Constitution itself also may be special factors counselling hesitation. It has already been suggested that, in the presence of these special factors, the courts will require the evidence of a positive intent to allow a tort remedy, rather than the mere absence of negative intent.[150] Therefore, when provisions of the Constitution are deemed to counsel hesitation, the plaintiff can only prevail when he successfully propounds evidence of an intent to allow a tort remedy. The previous discussion of the eleventh amendment[151] serves to illustrate this point. The eleventh amendment counsels hesitation; but the congressional grant of jurisdic-

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[144]*See, e.g.*, Walker v. McCune, 363 F. Supp. 254, 256 (E.D. Va. 1973); Johnson v. Alldredge, 349 F. Supp. 1230, 1231 (M.D. Pa. 1972).

[145]Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1346-47 (2d Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1165-66 (3d Cir. 1971); Carter v. Carlson, 447 F.2d 358, 371 (D.C. Cir. 1971) (Nichols, J., concurring), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[146]*See* cases cited note 145 *supra.*

[147]Butler v. United States, 365 F. Supp. 1035, 1040 (1973).

[148]487 F.2d 986 (2d Cir. 1973). *See also* Reese v. Nixon, 347 F. Supp. 314, 317 (C.D. Cal. 1972).

[149]487 F.2d at 993. *But cf.* Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973).

[150]*See* notes 68-73 & accompanying text *supra.*

[151]*See* notes 105-124 & accompanying text *supra.*

tion in section 1331 coupled with a waiver of state immunity is evidence of positive intent to allow a tort remedy.

In addition to the eleventh amendment, other provisions of the Constitution may also counsel hesitation. Although it has been demonstrated that the general grant of legislative power to Congress does not counsel hesitation,[152] the specific grants of legislative power probably do.[153] The *Bivens* Court may well have alluded to these specific grants in its brief discussion of *United States v. Standard Oil Co.*[154] and *Wheeldin v. Wheeler.*[155]

In *Standard Oil,* the Government sought damages for injuries inflicted upon a soldier by the defendant's negligence. No federal statute specifically created the right to recovery.[156] The Court noted that Congress had a specific constitutional grant of power to create the right to recover government property[157] but had chosen not to exercise this power.[158] The Court therefore denied the Government's claim, reasoning that the specific grant of legislative power to Congress precluded judicial recognition of a tort.

A comparison of *Wyandotte Transportation Co. v. United States*[159] with *Standard Oil* illustrates that the decision in *Standard Oil* was not merely the result of the Court's determination that the question was one of "federal fiscal policy"[160] over which Congress alone had control.[161] *Wyandotte* also involved a situation in which the Government sought to recover damages. The United States had removed a negligently sunken vessel from an inland waterway and sought to recover the cost of removal from the party at fault under the Rivers and Harbors Act of 1899.[162] The acts of the defendant were unquestionably wrongful as defined by the Act,[163] but the penalties provided by the Act did not specifically

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[152] *Cf.* cases cited notes 1, 19, & 51-57 *supra.* The general grant of legislative power reads: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

[153] There are many specific grants of legislative power to Congress throughout article I of the Constitution. For example, section 8 of article I is composed of a lengthy list of such powers.

[154] 332 U.S. 301 (1947).

[155] 373 U.S. 647 (1963).

[156] 332 U.S. at 314-16.

[157] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3.

[158] 332 U.S. at 316.

[159] 389 U.S. 191 (1967).

[160] 403 U.S. at 396, *quoting from* United States v. Standard Oil Co., 332 U.S. 301, 311 (1947).

[161] 332 U.S. at 316-17.

[162] 33 U.S.C. §§ 401-16 (1970).

[163] 389 U.S. at 197.

include recovery of the cost of removal of the vessels.[164] The same constitutional grant of specific legislative authority which had defeated recovery in *Standard Oil*[165] could have applied in *Wyandotte*. Yet, because legislation revealed a congressional intent to allow the tort remedy,[166] the Government prevailed.

The Court's reference in *Bivens* to *Wheeldin v. Wheeler*[167] provides another analogy to a constitutional tort situation and points to the specific grant of legislative power allowing Congress to make its own rules of its proceedings.[168] In *Wheeldin*, the Court was asked to allow a tort remedy to a citizen who was injured, albeit not in violation of the Constitution, as a result of the unauthorized issuance of a subpoena by an employee of the House Un-American Activities Committee. The legislation, which provided the committee with subpoena power, had established a general procedure for the issuance of subpoenas;[169] however, for the sake of efficiency, the committee had adopted a more informal procedure which did not conform with the legislation.[170] To have used the legislation as the basis of a tort action in *Wheeldin*, the Court would have found it necessary to hold that the committee's informal procedure was illegal. Since the legislation neither made the general subpoena procedure exclusive nor provided any penalty for nonconformity,[171] there was no evidence of any congressional intent to allow a tort remedy for noncompliance.[172] The Court's refusal to recognize a tort in this situation therefore may be viewed as an indication of judicial restraint in the face of a specific constitutional grant of power to Congress.

The Court in *Bivens* acknowledged that legislation in the form of a congressional prohibition of a tort remedy for violation of the Constitution would be a special factor counselling hesitation.[173] At the time of the *Bivens* affair, there was no legislation which

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[164]*Id.* at 197-200.

[165]*See* note 157 *supra.*

[166]389 U.S. at 200.

[167]373 U.S. 647 (1963).

[168]"Each House may determine the Rules of its Proceedings, [and] punish its Members for disorderly Behavior . . . ." U.S. CONST. art. I, § 5.

[169]Act of August 2, 1946, ch. 753, § 121(b), 60 Stat. 828.

> Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

[170]Wheeldin v. Wheeler, 302 F.2d 36, 37 (9th Cir. 1962), *aff'd*, 373 U.S. 647 (1963).

[171]*Id.*

[172]373 U.S. at 650.

[173]403 U.S. at 397.

might have been so construed. The defendants in the case might well have been subject to a criminal penalty under 18 U.S.C. § 2236,[174] which prohibits the illegal search of a private dwelling by a federal law enforcement officer.[175] However, the existence of a criminal penalty has rarely precluded a tort remedy;[176] instead, statutes defining criminal activity have frequently served as bases of substantive law from which a court could recognize a tort.[177] The defendants in *Bivens* were also potentially subject to disciplinary regulations of their employer. However, regulatory legislation, like criminal legislation, has served as the source of torts rather than as a special factor counselling hesitation.[178] The existence of federal legislation condemning the activities of the defendant will not usually be construed as a special factor counselling hesitation.

The Federal Tort Claims Act[179] has now been amended to waive governmental immunity for the torts of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, when the torts are committed by federal law enforcement officers.[180] The Act retains provisions which make a judgment against the United States[181] or an acceptance of an adminis-

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[174]18 U.S.C. § 2236 (1970). *See* Berch, *Money Damages for Fourth Amendment Violations by Federal Officials*, 1971 LAW & SOC. ORDER 43.

[175]By the summer of 1972, there had been no convictions under this legislation. Comment, *Money Damages for Unconstitutional Searches: Compensation or Deterrence?*, 1972 UTAH L. REV. 276, 278 n.14.

[176]*Compare* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), *with* Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972).

[177]*See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

[178]*See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956). *But see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1973).

[179]28 U.S.C. §§ 1346, 2671-80 (1970).

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> The provisions of this chapter and Section 1346(b) of this title shall not apply to—
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> . . . .
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> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law.

28 U.S.C.A. § 2680(h) (Cum. Supp. 1976), *amending* 28 U.S.C. § 2680(h) (1970).

[181]28 U.S.C. § 2676 (1970).

trative settlement by the United States[182] an absolute bar to further actions against the employee whose activities caused the injury. These provisions have never been construed to bar an original action against an employee; they merely bar an action against the employee after compensation by the Government.[183] The Act will therefore probably not be construed as a congressional declaration prohibiting a tort remedy for violation of the Constitution. In view of the legislative history of the amendment,[184] the Act probably will be viewed as an expression of congressional intent that constitutional torts should be remedied by tort actions in the federal courts.

It is important to note that the Act, as amended, is framed in the language of state common law torts[185] and specifically retains intact and unamended the provision which allows suits only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[186] At this date, no reported opinions construe the amended Act. However, in view of the explicit retention of provisions requiring the application of state laws, the courts will almost certainly base recovery under the Act upon state law.[187] If the state laws do not recognize violations of

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[182]*Id.* § 2672.

[183]*Cf.* Moon v. Price, 213 F.2d 795 (5th Cir. 1954); United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952).

[184]The Act was amended in response to fourth amendment violations by agents of the Federal Bureau of Narcotics during "raids" in Collinsville, Illinois, in April, 1973. These activities had attracted nationwide publicity. S. REP. No. 93-588, 93d Cong., 1st Sess. 3-4 (1973).

[185]The legislative history of the amendment reveals that the language was probably used in an attempt to include both state common law torts and constitutional torts.

> [T]he Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee amendment should not be viewed as limited to constitutional tort situations but would apply in any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

Id. at 4.

[186]28 U.S.C. § 1346(b) (1970).

[187]Section 1346(b) has been literally construed to require the application of state laws in every aspect of claims brought under the Act, except in situations where state laws conflict with specific provisions of the Act itself or in instances of strict liability. *See, e.g.*, Campbell v. United States, 493 F.2d 1000 (9th Cir. 1974); Cenna v. United States, 402 F.2d 168 (3d Cir. 1968); United States v. Becker, 378 F.2d 319 (9th Cir. 1967); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Anthony v. United States, 233 F. Supp. 693 (E.D. Mo. 1964).

the Constitution as independent torts, recovery under the Act will be an ineffective protection of constitutional interests. The same defenses which have served to defeat recovery in past actions against federal officers in the state courts[188] will continue to defeat recovery under the Act.

There is, however, some authority for the proposition that state courts are required to protect federal rights by applying federal law in state courts when existing state laws are inadequate to do so.[189] If this rationale can be applied to the Act, its provisions for the use of state law may be mitigated. The states would be required to recognize violations of the Constitution as independent torts and plaintiffs would then be compensated under the Act.[190]

Even if state laws do eventually recognize violations of the Constitution as independent torts, government liability under the Act probably will not extend to all constitutional torts. Interests protected by the first, fifth, sixth, eighth, ninth, and tenth amendments, which have already been adjudged to be within the scope of constitutional torts,[191] will not fall within the purview of the Act unless they are invaded as a proximate result of the intentional torts now covered by the Act. Even some fourth amendment violations may not be covered by the Act if they are the acts of officials who are not law enforcement officers, since the Act specifically refers only to acts committed by these officers.[192] Post-*Bivens* cases have demonstrated that constitutional tort actions are often brought against federal officials who are not law enforcement officers, such as volunteers working with the Presidential Advance

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[188]*See generally* Foote, *supra* note 11.

[189]General Oil Co. v. Crain, 209 U.S. 211 (1908). *Cf.* Parker v. Illinois, 333 U.S. 571 (1948); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); Ward v. Board of County Commr's, 253 U.S. 17 (1920). One of the rationales for this theory is based upon the supremacy clause in article VI of the Constitution. Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954). The other rationale is that the equal protection clause found in the fourteenth amendment requires states to make specific violations of the Federal Constitution actionable if concurrently violated state interests are inadequate to protect the federal interests. Katz, *supra* note 5, at 52. *See generally* Note, *State Remedies for Federally-Created Rights*, 47 MINN. L. REV. 815 (1963).

[190]Federal courts may be required to interpret state laws without benefit of precedent from state courts since some state courts have refused to accept jurisdiction over federal questions, and therefore have developed no body of law concerning federal constitutional torts. *Compare* Galbadon v. United Farm Workers Organizing Comm., 35 Cal. App. 3d 757, 111 Cal. Rptr. 203 (1973), *with* Cashen v. Spann, 125 N.J. Super. 386, 311 A.2d 1972 (App. Div. 1973).

[191]*See* cases cited notes 51-57 *supra*.

[192]*See* note 180 *supra*.

Office,[193] Veterans' Administration supervisory officials,[194] and members of the United States Board of Parole.[195] The Act, as it is now written, will be of no help to the plaintiff who has been injured by these officials.

IV. Summary and Conclusion

Constitutional torts now represent a body of federal common law similar to the common law previously developed in federal courts to remedy breaches of federal statutes. Congress has placed its imprimatur on some judicially created constitutional torts through passage of an amendment to the Federal Tort Claims Act. However, the scope of the amended Act is too narrow to include all constitutional torts and potential defendants. The scope of the Act is further limited by the retention of the requirement for the applicability of state law to suits under the Act. Therefore, the federal courts will be required to continue to forge the federal common law of constitutional torts in suits beyond the purview of the Act.

A problem unique to constitutional torts arises when state-created governmental entities are defendants. The problem becomes acute when the tort is a violation of the fourteenth amendment, since only states and their entities are capable of violating that amendment. If these defendants cannot be sued in federal courts for violation of constitutional torts, the federal policy of enforcing the Constitution in federal courts is thwarted; if, on the other hand, the federal courts indiscriminately allow these defendants to be sued in federal courts, there is a danger of violation of the eleventh amendment rights of the states. Thus far, those federal courts which have faced the problem thoughtfully have reached a reasonable solution by allowing tort remedies when the states have waived immunity to tort suits. However, there is a split of authority on the issue, which is yet to be resolved by the Supreme Court. Until the issue is resolved, the right to compensation for violations of rights enjoyed by all citizens of the United States will continue to depend upon the law of the state in which the violation occurred. Some Americans will continue to receive the unequal protection of the laws sought to be avoided by the fourteenth amendment; and, ironically, the unequal protection will usually occur when the fourteenth amendment has been violated.

Kathryn S. Wunsch

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[193]Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974).

[194]Scheunemann v. United States, 358 F. Supp. 875 (N.D. Ill. 1973).

[195]United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974).

The Reasonable Expectation of Privacy— *Katz v. United States*, A Postscriptum

In *Katz v. United States*,[1] the Supreme Court said that the "Fourth Amendment protects people, not places,"[2] thus extending the fourth amendment proscription against unreasonable searches and seizures to all areas in which a person has a reasonable expectation of privacy.[3] *Katz*, in enunciating the Court's new reading of fourth amendment standards, shifted the fourth amendment inquiry away from the presence or absence of physical intrusion into a "constitutionally protected" area or enclosure and thus explicitly overruled[4] the "trespass doctrine" of *Olmstead v. United States*[5] and *Goldman v. United States*.[6] Although the reasonable expectation standard enunciated by the Court in *Katz* may seem simple on its face, the abstractness of the new standard left room for considerable interpretation and refinement by the courts. The focus of this Note will be on the applications, interpretations, and refinements of the *Katz* standard in the federal courts.

The *Katz* standard of a reasonable expectation of privacy has been applied in various criminal contexts but is best examined when viewed in connection with electronic surveillance and wiretapping. When *Katz* is considered in this area, it is customary for the courts to also consider its forerunner, *Berger v. New York*,[7] which held unconstitutional as repugnant to the fourth amendment a New York statute concerning an *ex parte* order for eavesdropping.[8]

This Note will seek to explore the fourth amendment issues which confronted the Court in *Katz* and also in *Berger* by first explaining the *Katz* case and then examining briefly the historical evolution of the "reasonable expectation" standard. Finally, an analysis of the impact of the *Katz* decision on fourth amendment inquiries in the federal courts will be presented in order to show what the reasonable expectation of privacy has come to mean some eight years after the decision in *Katz* was rendered.

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[1] 389 U.S. 347 (1967).

[2] *Id.* at 351.

[3] *Id.* at 351-52.

[4] *Id.* at 353.

[5] 277 U.S. 438 (1928).

[6] 316 U.S. 129 (1942).

[7] 388 U.S. 41 (1967).

[8] Law of April 12, 1958, ch. 676, § 1, [1958] N.Y. Laws 786 (repealed 1968). New York's legislative response to *Berger* and subsequent cases is codified in N.Y. CODE CRIM. PRO. §§ 700.05-.70 (McKinney 1971), *as amended, id.* §§ 700.05, .10 (McKinney Supp. 1975).

I. The *Katz* Case

Katz originated in the United States District Court for the Southern District of California where the defendant was convicted under an indictment charging him with violating federal law by transmitting gambling information across state lines.[9] At trial, the court admitted, over objection, evidence of the defendant's phone conversations transmitting gambling information which had been overheard by FBI agents through an electronic monitoring device attached to the outside of a telephone booth. The evidence obtained by the federal agents by means of the warrantless "bug" was sufficiently damning, and the defendant was subsequently convicted. The Ninth Circuit affirmed the conviction,[10] finding no fourth amendment violation as there had been "no physical entrance into an area occupied by the appellant"[11] since the electronic listening device had been attached to the outside of the telephone booth.

The decision of the Ninth Circuit was in accord with the then accepted fourth amendment doctrine concerning electronic search and seizure as delineated in *Olmstead v. United States.*[12] The 5-4 decision in *Olmstead* set forth two basic principles in relation to electronic searches and seizures: (1) intangibles, and thus conversations, are outside the scope of the persons and things protected by the fourth amendment; and (2) surveillance that does not involve a trespassory invasion is not an unreasonable search and seizure.[13] *Goldman v. United States,*[14] another leading pre-*Katz/Berger* fourth amendment case, continued the *Olmstead* common law property concept of shaping fourth amendment protection in terms of a physical "breaking of the close." These two principles, although eroded in substance and effect during the nearly forty years between *Olmstead* and *Katz,* were still held as controlling by the Court.[15]

Although the dissenting opinion of Justice Black in *Katz* adhered to the standards of *Olmstead* and *Goldman,*[16] the majority

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[9]18 U.S.C. § 1084 (1970).

[10]Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

[11]*Id.* at 134.

[12]277 U.S. 438 (1928).

[13]*Id.* at 458-68. *See* 16 Kan. L. Rev. 549 (1968).

[14]316 U.S. 129 (1942).

[15]*See, e.g.,* Warden v. Hayden, 387 U.S. 294 (1967); Silverman v. United States, 365 U.S. 505 (1961).

[16]389 U.S. 347, 364 (1967) (Black, J., dissenting). Justice Black stated that he could not agree with the interpretation of the majority. His dissent was based on two reasons: (1) The words of the fourth amendment cannot be construed to apply to intangible verbal evidence, and (2) even though there have been staggering technological advances since the Bill of Rights was drafted, the fourth amendment should not be rewritten by the judicial branch

rejected these concepts.[17] The majority took a significant step by moving away from these anachronistic property law concepts[18] and toward a view of the fourth amendment which conformed to the realities of a modern technological society and to the developing constitutional concept of the right of privacy.

The majority opinion likewise rejected the view of *Olmstead* and *Goldman,* relied on in Justice Black's dissent, which held that the protection of the fourth amendment did not apply to conversations. The Court, citing *Silverman v. United States,*[19] said the "Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements."[20] In simplest terms, then, warrantless electronic surveillance which violates the privacy upon which a person justifiably relies is an unreasonable search and seizure, and the fruits of such a search and seizure, being placed on an equal level with tangible evidence, are inadmissible as evidence.[21]

The Court took the position that what a person seeks to preserve as private is constitutionally protected and what a person knowingly exposes to the public, even in his own home, is not within the scope of protection afforded by the fourth amendment. The position taken was the middle ground between two possible extreme readings of the fourth amendment. One extreme is that electronic eavesdropping is not covered by the amendment because under a literal reading mere words are not within its ambit.[22] The other extreme argues that fourth amendment protection indeed applies to electronic eavesdropping, and, further, that evidence from electronic eavesdropping can never be admissible into evidence even under a court-ordered search warrant because, due to the unpredictable nature of conversations, such a warrant could never meet the specificity requirement of the fourth amendment.[23]

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to bring it into harmony with the times just to reach a result the Court may deem desirable on policy grounds.

[17]Justice Stewart's majority opinion in *Katz* followed the reasoning of Justice Brennan's dissent in Lopez v. United States, 373 U.S. 427, 446 (1963).

[18]The property law concepts as formerly applied in the context of fourth amendment protection are anachronistic when viewed in light of the technological advancements which have taken place since those concepts became the controlling standard. *Cf.* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[19]365 U.S. 505 (1961).

[20]389 U.S. at 353.

[21]*See* Weeks v. United States, 232 U.S. 383 (1913). The Court held that tangible evidence secured by an unreasonable search and seizure in violation of the fourth amendment is inadmissible in the federal courts.

[22]*See* 389 U.S. at 364 (Black, J., dissenting).

[23]*See* United States v. Whitaker, 473 F. Supp. 358 (E.D. Pa. 1972);

The middle ground taken by the Court is most clearly enunciated in the concurring opinion of Justice Harlan wherein he stated, "My understanding of the rule . . . is . . . first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[24] Thus, the sole determinant of fourth amendment protection against warrantless searches and seizures by means of electronic surveillance will no longer be the presence or absence of a trespass into a "constitutionally protected area." Instead, the determination must be based upon considerations of first, whether the observed party has manifested an intent to keep his conversation private, and secondly, whether the manner in which the intent was manifested can meet an objective standard of reasonableness. The property or spatial considerations upon which the *Olmstead* standard was based cannot be entirely disregarded under the new standard, however, because they influence the determination of the objective reasonableness of the expectation.[25]

The abstractness of the "reasonable expectation" standard is readily apparent, and no set formula can be offered which will provide a simple basis for application. Rather, its application must be on a case-by-case basis. This ad hoc classification basis is not to be derided simply because its provides no hard and fast rule upon which a questionable situation may be evaluated; instead, it should be considered in light of the two interests which the Court attempted to reconcile in *Katz*: the "constitutional" right to privacy, and the belief of law enforcement officials that electronic surveillance is an effective and necessary tool in the fight against crime.[26] It is fair to say that the Court utilized an implicit balancing process in arriving at its conclusion in *Katz*, and that same balancing process should be a part of the "reasonable expectation" standard when it comes into issue in a prosecution.

Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

[24]389 U.S. at 361 (Harlan, J., concurring).

[25]United States v. Hunt, 505 F.2d 931 (5th Cir. 1974).

[26]"[T]he investigative technique of wiretapping was invaluable. In a substantial number [of prosecutions] . . . it was indispensable." *Hearings on H.R. 762 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 314-15 (1955) (testimony of Frank Hogan, District Attorney of New York City).

> Organizations of police and district attorneys have constantly presented their case to the governor or legislature, claiming without hesitation that wiretapping has been their most effective weapon against organized crime.

S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 38 (1959).

II. The Historical Precedent—Reasons for the Shift

Although *Katz* was indeed a deviation from the property law standards for determining the constitutionality of an eavesdrop as embodied in the *Olmstead* decision, the decision is supported by diverse historical precedent from the English common law.[27] The decision is further supported by increasing awareness of the necessity of protection from governmental intrusions into the private lives of the citizenry, especially when viewed in light of the ever increasing sophistication of electronic gadgetry, which enables intrusions into private lives far beyond the wildest dreams of the Framers or even those of the *Olmstead* majority.[28]

The majority in *Katz* expressly disclaimed "privacy" as a basis for its decision,[29] finding that there is no general right to privacy secured by the fourth amendment and that protection of such a right, if it is to exist at all, is to be left to the states.[30] Consequently, following this literal interpretation of the principal case, any rights of privacy which might be protected by the fourth amendment are merely incidental to its primary focus, which is protection against arbitrary governmental invasions into the lives of the people.[31] The *Katz* Court, although it expressly disclaimed a general fourth amendment right of privacy, still made it clear that what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[32] Even though a general right of privacy was disclaimed, *Katz* is clearly rooted in that concept, the issue of privacy appearing repeatedly in the majority and concurring opinions. On a root level, privacy is one of the key issues in the case and may be considered the underlying basis of the decision.

If *Katz* is viewed as part of an increasing constitutional protection of an individual's right to privacy, then the decision itself does not seem to be an abrupt departure from the past constitutional dogma of defining the scope of fourth amendment protection in terms of a physical trespass. Rather, it can be considered as part

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[27]The common law courts of England disfavored the use of eavesdropping. The age-old standards which show the disfavor of the common law courts with the practice of eavesdropping were set forth in the famous case of Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765). *See also* 4 W. Blackstone, Commentaries *168.

[28]*See generally* Note, *From Private Places to Personal Privacy: A Post-Katz Study in Fourth Amendment Protection,* 43 N.Y.U.L. Rev. 968 (1968) (discussion of the evolution of the fourth amendment in connection with eavesdropping).

[29]389 U.S. at 350.

[30]*Id.* at 350-51.

[31]*But cf.* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("the principal object of the Fourth Amendment is the protection of privacy . . . .").

[32]389 U.S. at 351-52. *See also* 22 Ark. L. Rev. 518, 521 (1968).

of a flow toward recognition of a "zone of privacy created by several fundamental constitutional guarantees."[33]

Katz should not be read as a monumental shift in constitutional theory. Instead, it should be viewed as a redefinition of the scope of fourth amendment protection made in order to conform to contemporary notions of the need for recognition of a quasi-constitutional right to privacy and to place the application of the fourth amendment on a basis roughly commensurate with the scope of protection theoretically propounded by the Framers. *Katz* redefined the range of fourth amendment protection to conform to technological advances.

In this context, then, *Katz* is based on the historical precedent of the landmark fourth amendment case of *Boyd v. United States*.[34] There the Court stressed the purpose and spirit of the amendment and shied away from a literal reading of the words "search and seizure." Historically analyzing searches and seizures, the Court placed its emphasis on the rudimentary principles inherent in a free government which

> apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .[35]

The *Boyd* Court also emphasized the necessity of liberally construing constitutional provisions for the security of person and property, noting that "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[36]

Viewed in light of these thoughts from *Boyd, Katz* seems mandated by the fourth amendment, because to hold as did *Olmstead,* that the protection of the amendment can be invoked only when there has been a physical trespass of a "constitutionally protected area," would be to deprive the amendment of its essential meaning and purpose, which is to protect the citizenry from unreasonable searches and seizures.

In *Olmstead,* the first wiretapping case to reach the Supreme Court, Justice Brandeis recognized the practical and historical error of the majority in confining the scope of fourth amendment pro-

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[33]Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[34]116 U.S. 616 (1886).

[35]*Id.* at 630.

[36]*Id.* at 635.

tection to "constitutionally protected areas." In the application of constitutional protection, Brandeis called for the Court to look to the future, not to the past. With foresight, he speculated on the possibility of future technological developments which would enable the government to reproduce in court the private papers of a person without removing them from their supposedly secret position and thereby "expose to a jury the most intimate occurrences of the home."[37]

The Brandeis dissent followed the lead of *Boyd*, urging that the interpretation of the Constitution not be rigidly fixed by then contemporary circumstances, but rather be given an interpretation sufficiently broad and liberal so as to render the interpretation applicable even if quantum changes occur in the society or technology. Justice Murphy dissented in *Goldman v. United States*,[38] stating that it was the "duty [of the Court] to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation."[39]

Thus *Katz* follows the lead of *Boyd* and its teachings as accepted by dissenters in earlier fourth amendment cases by explicitly redefining the nature of the inquiry and implicitly increasing or expanding the scope of protection under the fourth amendment. Although the Court stated that the fourth amendment could not "be translated into a general constitutional 'right to privacy,' "[40] contrary to wishes of many writers who urged that the existence of a constitutionally protected "right to privacy" established in *Griswold v. Connecticut*[41] be expanded to protect the individual from electronic eavesdropping,[42] the *Katz* Court did, in practical effect, help move the fourth amendment into the area of "privacy," thus adding perhaps another dimension to it.[43]

The move of the Court in *Katz* toward a new interpretation of the fourth amendment, although it may be considered merely as an elevation of the teachings of *Boyd* and the Brandeis and Murphy dissents and as a repudiation of the *Olmstead* "trespass doctrine," more probably was based on practical realities. In 1967, the ease

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[37]277 U.S. at 474 (Brandeis, J., dissenting).

[38]316 U.S. 129 (1921).

[39]*Id.* at 138 (Murphy, J., dissenting).

[40]389 U.S. at 350.

[41]381 U.S. 479 (1965).

[42]The urgings of these writers are chronicled in a 1966 student article. Note, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. REV. 835, 841-46 (1966).

[43]The fourth amendment, however, was long ago seen to be an element of the privacy concept. In 1914, the Supreme Court construed the fourth amendment as including within its penumbra a "right of privacy" not specifically enumerated in the Constitution. Weeks v. United States, 232 U.S. 383 (1914).

with which the government could employ electronic surveillance devices would have boggled the minds of the agents who tapped Olmstead's telephone.[44] As the sophistication of "bugs" and "taps" increased, giving the eavesdropper the ability to monitor conversations without even remotely committing a physical invasion of a protected area, the fourth amendment protection afforded by the *Olmstead* criterion decreased considerably. Thus viewed, *Katz* is a policy decision seeking to alleviate the erosion of fourth amendment protection caused by technological advancements. While at the same time reiterating the traditional judicial disfavor with eavesdropping dating back to *Entick v. Carrington*,[45] the Court in *Katz* and the related cases of *Berger v. New York*[46] and *Osborn v. United States*[47] recognized that electronic eavesdropping was an indispensable tool of effective law enforcement. In those three cases, however, the Court insured that insofar as electronic eavesdropping is concerned, it will not create an arena for "the dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers."[48]

In summary, *Katz* is best viewed as a case adhering to the belief that the Constitution is not a document tied to any particular era and the further belief that the content of the fourth amendment right to be free from unreasonable searches and seizures must be shaped by the context in which it is asserted. And, in the context of electronic surveillance, the tests by which protection is to be evaluated must reflect the changes of society and science.[49] The controlling principles were not new; they were only applied to a new, different, and modern set of facts.[50]

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[44]Although some of the material has become somewhat dated because of new developments in electronic gadgetry, the basic techniques and devices used in electronic surveillance and eavesdropping as well as how they are put into use are detailed in S. DASH, R. KNOWLTON & R. SCHWARTZ, THE EAVESDROPPERS 303-79 (1959) (a study sponsored by the Pennsylvania State Bar Association).

[45]95 Eng. Rep. 807 (K.B. 1765).

[46]388 U.S. 41 (1967).

[47]385 U.S. 323 (1966).

[48]On Lee v. United States, 343 U.S. 747, 758 (1951) (Frankfurter, J., dissenting).

[49]Two years after *Katz* was decided, Justice Harlan crystallized these thoughts.

> It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined by a blend of historical understanding and the adaption of purpose to contemporary understanding.

Williams v. Florida, 399 U.S. 78, 124-25 (1969) (Harlan, J., concurring in part, dissenting in part).

[50]*See* Muny v. Beto, 434 F.2d 697, 716 (5th Cir. 1970) (Gervin, J., concurring in part, dissenting in part).

III. *Katz* Refined and Applied by the Courts

Since *Katz* represented what was and is considered to be a clear break with much of the constitutional dogma pertaining to searches and seizures, and because the "holding" of the case[51] was couched in rather general terms, *Katz* has been relied upon in various contexts. The years since *Katz* have found the courts laboring with its holding in attempting to ascertain its full meaning and the effects the case has on matters outside the fact situation presented in *Katz*. Additionally, Congress and the legislatures have rewritten and amended wiretap statutes in order to conform to the constitutional principles elaborated in *Katz*.[52]

This section will examine the post-*Katz* case law under four broad headings: prospective and retroactive application, standing to utilize the *Katz* ruling, court-ordered surveillance, and "reasonable expectations." The subsections will focus on the practical effect of the post-*Katz* cases as well as their position in relation to the general trend of development of fourth amendment law. Additionally, each of the subsections will attempt to analyze the position of the post-*Katz* cases vis-à-vis the twin policy considerations which the Court attempted to balance in *Katz*.

A. Prospective and Retroactive Application

A discussion of retroactive application may seem to be irrelevant since over eight years have passed since *Katz* was decided, and therefore, few prosecutions would be pending which would rely upon evidence obtained from pre-*Katz* investigations. Further, it is unlikely that any prisoner petitions now outstanding would turn on the question of retroactive application of *Katz*. However, the factors involved in the prospective/retroactive determination serve as a further illustration and elaboration of the policy considerations behind *Katz*.

As *Katz* was a substantial change from prevailing fourth amendment standards, and as there were any number of warrantless electronic surveillances which took place before that decision which did not lead to prosecutions until after the decision, it was inevitable that the Court would have to pass on the retroactivity of the new standard. The leading case is *Desist v. United States*.[53] The defendants were convicted in the Southern District of New York of conspiring to import and conceal heroin in violation of fed-

[51] "[T]he Fourth Amendment protects people, not places." 389 U.S. at 351.

[52] Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970) (the congressional response to the principles of *Katz* and *Berger*).

[53] 394 U.S. 244 (1968).

eral law.[54] Tapes of conversations in a hotel room among several of the defendants were made by federal agents in an adjacent room via an electronic monitoring device. The device did not physically intrude into the room occupied by the defendants. The district court allowed the tapes to be introduced into evidence, and the Second Circuit affirmed, rejecting the argument that the evidence was inadmissible on the ground that the eavesdrop violated the fourth amendment rights of the defendants.[55]

Ostensibly, the facts in *Desist* were such as to provide a simple, straightforward application of *Katz*, which would require a holding that the tapes were inadmissible since they were obtained in violation of the fourth amendment protection against unreasonable searches and seizures. The defendants obviously had a subjective intent that their conversations were to be private, and surely their expectation of privacy was reasonable under the circumstances. If *Katz* were to be given retroactive effect by the Court, *Desist* was the vehicle for doing so. The Court said, "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past."[56] The Court then held that "to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application."[57]

Over the dissents of Justices Harlan[58] and Douglas,[59] the majority reasoned that the exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden of administering justice, overturn convictions based on fair reliance upon pre-*Katz* decisions, and, significantly, would not serve to deter similar searches and seizures in the future.[60] Thus *Desist* continued the balancing of the individual rights guaranteed by the Constitution and the needs of law enforcement in this sensitive area.[61]

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[54]21 U.S.C. §§ 173-74 (1970).

[55]Desist v. United States, 384 F.2d 889 (2d Cir. 1968).

[56]394 U.S. at 248.

[57]*Id.* at 246.

[58]*Id.* at 259 (Harlan, J., dissenting).

[59]*Id.* at 255 (Douglas, J., dissenting).

[60]*Id.* at 253.

[61]The decision of the Supreme Court to give only prospective effect to *Katz* seems to be a correct application of the three-pronged test developed by the Court for a determination of retroactivity. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). The three elements of this test are: (1) The purpose to be served by the new standard, (2) the extent of reliance by law enforcement officials on prior standards, and (3) the effect on the administration of justice in giving retroactive effect. Among the three factors, primary weight must be accorded to the "purpose" of the new standard. Desist v. United States, 394 U.S. 244, 249 (1968). The "purpose" element is broken down into two broad categories: (1) Decisions designed to deter unconstitutional action, and (2) decisions announcing rules fashioned to correct flaws in the fact-finding process at trial. Stovall v. Denno, 388 U.S. 293, 298 n.12 (1969);

In the face of the holding in *Desist*, in one of the appeals taken from the cases connected with the Bobby Baker prosecutions,[62] the appellee-defendant argued that *Desist* did not foreclose the issue of pre-*Katz* nontrespassory electronic surveillance. The contention was that even without *Katz*, precedents prior to that decision justified the suppression. The District of Columbia Circuit labeled that argument "a dubious proposition at best . . . made only more so by the Supreme Court's recognition in *Desist* that *Katz* represented 'a clear break with the past.' "[63]

B. Standing to Utilize the Katz *Ruling*

The baseline consideration in determining the standing of a defendant to utilize the "reasonable expectation of privacy" concept set forth in *Katz* is found in the earlier case of *Jones v. United States*,[64] which held that to qualify as a person aggrieved by an unlawful search and seizure and thus to meet the standing requirement, he must have been the person against whom the search was directed, as distinguished from one who claims prejudice as a consequence of a search directed against someone else. The standing requirement of *Jones* requires a party who seeks to challenge the legality of a search, in order to suppress relevant evidence, to allege and establish that he himself was the victim of an invasion of privacy.[65]

In *Alderman v. United States*,[66] the first case to reach the Court after the *Katz* decision where warrantless electronic surveillance performed on others was urged to be inadmissible as to the defendants, the *Jones* approach was adhered to by the majority of the Court, which held that suppression of the product of a fourth

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Bannister v. United States, 446 F.2d 1176, 1179 (3d Cir. 1971). The purpose of the *Katz* ruling was to deter unconstitutional state action in the form of unreasonable searches and seizures. Since that purpose could be effected only with respect to future action, retroactive application was unnecessary to further that purpose. Consequently, *Katz* as interpreted by *Desist* follows the general pattern of denial of retroactive effect. United States v. Ligouri, 438 F.2d 663, 675 (2d Cir. 1971) (Appendix: Summary of Supreme Court Decisions After *Linkletter* on Question Whether New Rulings Holding Certain Criminal Procedures Unconstitutional Should Be Applied Retroactively).

[62]United States v. Jones, 433 F.2d 1176 (D.C. Cir. 1970). In this case the Government appealed under 18 U.S.C. § 3731 from the grant of the district court, after an evidentiary hearing, of a pretrial motion to suppress. In ruling on the motion to suppress, the district court relied primarily on its reading of *Katz* as invalidating on fourth amendment grounds all monitoring of conversations which had not been approved in advance by judicial authority. United States v. Jones, 292 F. Supp. 1001 (D.D.C. 1968).

[63]433 F.2d at 1179.

[64]362 U.S. 257 (1960).

[65]*Id.* at 261.

[66]394 U.S. 165 (1968).

amendment violation can be successfully urged only by those whose rights were violated by the search.[67]

In *Alderman,* Justice White, writing for the majority, and Justices Harlan[68] and Fortas[69] debated the finer points in the area of standing with respect to the *Katz* ruling. It was the opinion of Justice White that *Katz,* by holding that the fourth amendment protects people and their conversations, did not withdraw any of the protection which that amendment extends to the home or overrule the doctrine of *Silverman v. United States,*[70] which held that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home.[71] Under this view a defendant would be entitled to suppression not only where he himself was a party to conversations obtained by surveillance violative of the fourth amendment, but also where the conversation occurred on his premises, whether or not he was present or a party thereto.

Justice Harlan pointed out the deficiency in Justice White's analysis. If there had in fact been no physical trespass upon the premises, Justice Harlan could not understand how traditional theory permitted the owner to complain about a monitored conversation in which he did not participate because he could not argue for suppression under the theory that the conversations were the "fruits" of an unconstitutional invasion of his property rights. However, Justice Harlan noted that the "fruits" theory would require a different result if the conversations were monitored through the use of a device which did physically trespass on the defendant's premises. Since that theory depended completely upon the presence or absence of a physical trespass, Justice Harlan was of the opinion that "the entire theoretical basis of standing law must be reconsidered in the area of conversational privacy."[72]

Justice Harlan further argued that the approach of the majority was contrary to the spirit and basis of *Katz* in that even though *Olmstead* and the property law concepts tied to that decision were purportedly overruled in *Katz,* they would be resurrected in the law of standing. He urged that the property concepts be entirely rejected and that the law of standing be reinterpreted so as to conform with the substantive principles announced in *Katz.*

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[67] We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, unlike some other constitutional rights, may not be vicariously asserted.

Id. at 174.

[68] *Id.* at 190 (Harlan, J., concurring in part, dissenting in part).

[69] *Id.* at 200 (Fortas, J., concurring in part, dissenting in part).

[70] 365 U.S. 505 (1961).

[71] 394 U.S. at 179.

[72] *Id.* at 190 (Harlan, J., concurring in part, dissenting in part).

He would have granted standing "to every person who participates in a conversation he legitimately expects will remain private,"[73] and, following the rule in *Jones v. United States,*[74] he would have denied standing to property owners attempting to assert a fourth amendment claim in this area because "granting property owners standing does not permit them to vindicate intrusions upon their own privacy but simply permits criminal defendants to intrude into the private lives of others."[75]

Justice Fortas took an extreme approach to the standing question in *Alderman.* He criticized the majority's use of *Jones* as contextual[76] and stated that, considering the rejection of property concepts in *Katz, Jones* requires inclusion within the category of those who may have standing to object to the introduction of illegally obtained evidence any of those against whom the search is directed. To Justice Fortas the fact that government agents conducted their unlawful search and seizure for the purpose of obtaining evidence to use against a person was sufficient to give that person standing. The rights of the citizen were violated when the government "seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation and using it against him at trial."[77]

Of the three viewpoints, it is apparent that Justice Harlan took not only the most logically consistent approach, but also the approach which most clearly conforms to the spirit and rationale of *Katz.* The majority opinion overlooked the rejection in *Katz* of property law concepts. Justice Fortas' opinion did not attempt to strike the balance between "privacy" and the needs of law enforcement for which the post-*Katz* decisions have striven.

Indeed, the soundest approach to the standing question in the context of conversational privacy is simply to apply the substantive *Katz* test in a straightforward manner. If the party objecting to the introduction of records of conversations did not participate in those conversations, that party could not have had an expectation of privacy with respect to those conversations that society would be prepared to recognize as reasonable.[78] If the thrust of *Katz* is to expand *personal* privacy, one should not be given standing to object to the invasion of someone else's privacy. The vindication of

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[73] *Id.* at 191.

[74] 362 U.S. 257 (1960).

[75] 394 U.S. at 192 (Harlan, J., concurring in part, dissenting in part).

[76] *Id.* at 207-08 (Fortas, J., concurring in part, dissenting in part).

[77] *Id.* at 209.

[78] United States v. Kane, 450 F.2d 77 (5th Cir. 1971); United States v. Cataldo, 433 F.2d 40 (2d Cir. 1970); Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970).

the invasion of that right should be left to the aggrieved party.[79] The drawback to this approach, however, is that it seemingly sanctions what may well be overzealous activity by government agents if the party whose privacy was in fact invaded does not seek recourse against that invasion.

C. *Court-Ordered Electronic Surveillance*

Katz held that searches conducted without prior judicial or magisterial approval were, subject to a few well established and delineated exceptions, per se unreasonable under the fourth amendment.[80] Thus, although the Court in *Katz* recognized the needs of the individual to freedom from the uninvited ear, it tempered its holding by legitimizing electronic surveillance if sanctioned in advance by a neutral judicial authority. That a duly authorized magistrate could constitutionally grant permission for electronic surveillance was established a year before *Katz* in *Osborn v. United States.*[81] *Katz,* then, when considered in connection with *Osborn,* means that one's "reasonable expectation of privacy" can be overcome by court-ordered electronic surveillance.

The court-ordered surveillance is, however, subject to the limitations imposed upon such judicial action by *Berger v. New York,*[82] the often-cited companion case to *Katz. Berger,* as *Katz,* hinged on the balancing of individual freedoms against the interests of law enforcement and took a positive stand in favor of individual freedom in light of the threat of electronic eavesdropping.[83] Although the Supreme Court did not in *Berger,* nor elsewhere, specifically enumerate the criteria which, if met, would enable an electronic surveillance statute to withstand constitutional scrutiny, several of the circuits and a number of commentators have viewed

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[79]The Supreme Court has recognized a federal cause of action under the fourth amendment for which damages are recoverable upon proof of injury from government agents' violation of that amendment. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[80]389 U.S. at 357.

[81]385 U.S. 323 (1966).

[82]388 U.S. 41 (1967).

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> [W]e cannot forgive the requirement of the Fourth Amendment in the name of law enforcement. This is no formality that we require today, but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While the requirements of the Fourth Amendment are not inflexible to the legitimate needs of law enforcement, it is not asking too much that officers be required to comply with the basic commands of the Fourth Amendment, before the innermost secrets of one's home or office are invaded. Few threats exist which are greater than that posed by the use of electronic devices.

Id. at 62-63.

the flaws found in the New York wiretap statute by the majority of the Court in *Berger*, taken in connection with the principles of *Katz* and *Osborn*, as constituting criteria for making that determination.[84] The Eighth Circuit viewed *Katz*, *Berger*, and *Osborn* as setting forth certain requirements for court-ordered electronic surveillance under an applicable statute.[85]

It being clear from *Katz*, *Osborn*, and *Berger* that a statute authorizing electronic surveillance which contains sufficient prior safeguards is constitutionally permissible,[86] Congress enacted such a statute in Title III of the Omnibus Crime Control and Safe Streets Act of 1968[87] as a response to cases such as *Katz* which redefined the constitutional parameters of fourth amendment protection.[88] The various challenges to Title III in the courts provide further insight into the constitutional basis of "privacy" under the fourth amendment and into the delicate balance between individual freedom and the need for effective law enforcement.

Title III was held unconstitutional by the United States District Court for the Eastern Division of Pennsylvania in *United States v. Whitaker*.[89] Even though the statute seemed to be drafted in conformity with *Katz* and *Berger* and roughly approximated the guidelines thought to be mandated by those decisions, the *Whitaker* court held the statute unconstitutional on the following grounds: (1) The time of the intrusion called for by the statute, thirty days, was not precise, carefully circumscribed, or sufficiently limited; (2) the

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[84]United States v. Tortorello, 480 F.2d 764 (2nd Cir. 1973); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Whitaker, 474 F.2d 1246 (3d Cir. 1973); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969); 16 KAN. L. REV. 549, 551-52 (1968); 9 WM. & MARY L. REV. 1167 (1968).

[85]These requirements are: (1) That the applicant procure from a neutral and detached authority (a judicial officer) an order permitting the surveillance; (2) that to procure the order or a renewal thereof, the applicant must show probable cause that an offense has been or is being committed; (3) that the applicant state with particularity the offense being investigated; (4) that the applicant state with particularity the place being searched (the telephone being "tapped" or the premises being "bugged"); (5) that the applicant state with particularity the things (conversations) being seized; (6) that the order be executed with dispatch; (7) that the surveillance not continue beyond the procurement of the conversation and thereby become a series of intrusions, searches, and seizures pursuant to a single showing of probable cause; (8) that the order overcome the lack of notice by a showing of exigency as a precondition to the order; and (9) that the order require a return on the warrant. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).

[86]United States v. Bobo, 477 F.2d 974 (4th Cir. 1973).

[87]18 U.S.C. §§ 2510-20 (1970).

[88]*Cf.* United States v. Eastman, 465 F.2d 1057, 1062 n.11 (3d Cir. 1972).

[89]343 F. Supp. 358 (E.D. Pa. 1972).

statute lacked specific guidelines restricting the discretion of the executing officers; and (3) it provided for unreasonable searches and seizures by not requiring prompt notice after the authorized surveillance was completed. Chief Judge Joseph S. Lord III of the Eastern District of Pennsylvania said in *Whitaker*, "[T]he act does not command a constitutional order, it permits an unconstitutional one."[90] Although Chief Judge Lord's decision in *Whitaker* was rejected by the Third Circuit,[91] it does raise some significant questions which bear on the balancing test applied by the Supreme Court between individual freedom and law enforcement needs.

Many of these same questions were raised in an article even more critical of court-ordered electronic surveillance than the position taken by Chief Judge Lord in *Whitaker*.[92] Professor Spritzer argued that *Katz*, in sanctioning electronic surveillance with prior judicial approval, violated the fundamental precepts of the fourth amendment and the reasons for which that amendment was redrafted before inclusion in the Bill of Rights by the Committee of Eleven. His contention was that certain things are inviolate under the fourth amendment, one of which is conversation. In the alternative, Spritzer took the tack of Chief Judge Lord in *Whitaker* and argued that there can be no constitutional search warrants issued for electronic surveillance.

In strictest logic, the idea that there can be no search warrant issued for conversations under the fourth amendment is not without merit. The specificity requirement cannot be met since there is no possible way to specifically describe the conversations to be

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[90]*Id.* at 363. In United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), the Third Circuit, per Judge Aldisert, rejected Judge Lord's position that Title III was not precise or limited, citing United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972), which upheld Title III as being in accordance with the mandate of *Berger*. The *Cox* court noted that Congress, in enacting Title III, had dealt with the problem about as well as could be expected considering the nature and character of the subject matter and its incidents. 449 F.2d at 687. *Cafero* also rejected Judge Lord's day-counting approach, finding that it overlooked the congressional intent that the length of the interception be judicially determined on a case-by-case basis and that the interception be terminated whenever the objective of the authorization is achieved; so that while there is a 30-day maximum, each interception has the potential of a much earlier conclusion. Pointedly, the Third Circuit rejected the contention that Title III vests too much discretion in the executing officer because of an unavoidable lack of precision in describing the proposed object of the surveillance, noting that suppression under 18 U.S.C. § 2515 (prohibition of use as evidence of intercepted wire or oral communications) remains the appropriate remedy when imprecisions in an application or warrant attain constitutional dimensions or when execution of the warrant is improper.

[91]United States v. Whitaker, 374 F.2d 1246 (3d Cir. 1973), *rev'g* 343 F. Supp. 358 (E.D. Pa. 1972).

[92]Spritzer, *Electronic Surveillance by Leave of Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

seized because they are not in existence at the time the application is ruled upon. There is also merit in the attack on court-ordered electronic surveillance based on the idea that there is too much discretion given to the executing officers. During the course of the surveillance, many of the conversations monitored will be irrelevant to the particular investigation; therefore the privacy of the individual under surveillance will be compromised.

However, these attacks on Title III and on court-ordered electronic surveillance overlook the underlying aim of the *Katz/Berger* cluster of cases which give a contemporary application to fourth amendment protection: maximizing individual freedom while at the same time not denying law enforcement a recognizedly effective means of investigation. Just as the devoted champions of individual freedom and security do not believe that the newer standards of the *Katz* line of cases give sufficient protection to the individual and are repugnant to the dictates of the Constitution, the law enforcement authorities argue that the newer standards constrict them in their enterprise, likewise a protection of the individual.

The Court in *Katz* and *Berger* compromised these two extremes by sanctioning electronic surveillance only when made pursuant to a court order which meets the guidelines set forth in *Berger*, issued by a neutral and detached judicial authority. This compromise is in line with the often cited words of Justice Jackson who, commenting on the fourth amendment, said

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[93]

The compromise arrived at by the Court in providing that the judiciary act as a buffer between law enforcement authorities and

[93]Johnson v. United States, 333 U.S. 10, 13-14 (1948).

the citizenry as regards electronic surveillance thus conforms to historical tradition.[94]

If one is to grant the legitimacy of the need of law enforcement officers to utilize electronic surveillance in investigations, then it seems that the standards flowing from *Katz* and *Berger* provide adequate assurances to the public that there is little room for abuse of electronic surveillance techniques on the part of law enforcement if the judiciary continues to maintain a neutral, detached, and independent posture and if the guidelines as incorporated into statutes are rigidly adhered to and strictly construed.[95] Rigid adherence and strict construction, however, are not to be taken to such extremes so as to totally limit the efficacy of an electronic surveillance. If the guidelines and statutes are read in their narrowest context, it could be argued that court-ordered eavesdrops would be so circumscribed under the specificity requirement of the fourth amendment as to allow only the so-called "rifle shot" eavesdrop—one pertaining only to a single conversation. The courts have not so held; instead, they have analogized the eavesdrop situation to that of a search of a building. Just as the search of a building for tangible evidence perhaps will involve seeing and hearing irrelevant things, an electronic search extending over a period of several days will necessarily involve overhearing irrelevant conversations.[96] Under Title III, protection against introduction of evidence not within the specific confines of the warrant is built in by an evidentiary bar against reception of contents of communications received in violation of the fourth amendment.[97] Further protection is afforded in Title III by the availability of suppression for the contents of any wire or oral communications, or evidence derived therefrom, if the communication was unlawfully obtained by a warrantless eavesdrop.[98]

An additional process of analogy has also slightly broadened the scope of court-ordered electronic surveillances. *Katz* held that

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> It has long been the rule that the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried actions of officers.

Perkins v. United States, 432 F.2d 612, 614 (D.C. Cir. 1970) (Bazelon, C.J., dissenting).

[95]The courts have strictly construed electronic surveillance statutes such as Title III. *See* United States v. George, 465 F.2d 772 (6th Cir. 1972); United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972); United States v. Giordano, 469 F.2d 522 (3d Cir. 1972). *But see* United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972), where the court reversed suppression ordered by the district court, finding substantial compliance with the statute.

[96]United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).

[97]18 U.S.C. § 2515 (1970).

[98]18 U.S.C. § 2518(10)(a)(i) (1970).

searches conducted without prior judicial approval are per se unreasonable under the fourth amendment, subject to only a few exceptions.[99] Among those exceptions is the "plain view" doctrine, which has been held applicable in the area of electronic searches.[100] However, it must be noted that, when attempting to apply the exceptions that may justify warrantless searches and seizures, the exceptions are strictly construed. Those who seek exemption from the rule that warrantless searches and seizures are per se unreasonable must show that their course was made imperative by the exigencies of the situation.[101]

Even with all the purported protection emanating from *Katz* and *Berger*, when the total number of state and federal electronic surveillances authorized by court order[102] is examined, one naturally becomes skeptical about whether in practical effect those cases have really increased the scope of fourth amendment protection. In 1969 the total number of state and federal eavesdrops was 302, in 1970 the number increased to 597, and in the following year, 1971, the number again rose dramatically to 816. The number increased not so rapidly in 1972 to 855.[103] While this nearly threefold increase in three years time may be viewed as the result of more aggressive law enforcement, stemming from the "law and order" emphasis of that period, it nevertheless is a figure striking on its face and may have far-reaching implications. Even though the searches must be judicially approved, and, under Title III the request must also be approved by a "politically responsible" official in the Department of Justice,[104] it could be argued that the num-

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[99]389 U.S. at 357.

[100]United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1970); United States v. Escander, 319 F. Supp. 295 (S.D. Fla. 1970). In the *Sklaroff* case, Judge Cabot wrote:

> It is well settled law in search and seizure cases that certain items not named in the search warrant may be seized if discovered in the course of a lawful search. By analogy, the same rule should apply to conversations, which are "seizures" under the *Katz* case. 18 U.S.C. § 2517 provides that, when approved by a court of competent jurisdiction, intercepted conversations relating to other crimes may be used as evidence or divulged, provided the original interception itself was authorized by lawful court order. This is only a re-statement of the existing case law, adapted to fit the electronic surveillance situation.

323 F. Supp. at 307 (citations omitted).

[101]Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[102]*See* Holmes v. Burr, 486 F.2d 55, 63 n.3 (9th Cir. 1973) (Hufstedler, J., dissenting) (table of federal and state authorized wiretapping and electronic surveillance).

[103]*Id.*

[104]United States v. Giordano, 469 F.2d 55 (3d Cir. 1972); *cf.* United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972).

ber of eavesdrops alone and the attitude implied by such widespread utilization warrants consideration of further restraint on their use.[105]

D. What Expectations Are Reasonable?

Although the "reasonable expectation" standard set forth by the Supreme Court in *Katz* is clearly an abstraction, the subsequent cases have lent some degree of precision to the standard by either expressly holding that there can be no reasonable expectation of privacy in a certain situation or finding the *Katz* standard applicable and thus suppressing or barring evidence.

1. Informers and Consensual Eavesdropping.—The technique of using plants or informers is a standard investigation tactic utilized by police. With the advent of small wireless FM transmitters, this tactic became closely related to the other types of electronic surveillance which involve no direct contact between the investigators and the suspected lawbreakers. By utilizing an informer outfitted with such a transmitter, incriminating conversations, thought to be in confidence, may be recorded, for potential courtroom use, in a remote location. Closely related to the "wired informer" problems are those encountered where one party to a conversation consents either to a "tap" of his telephone, or to the placing of a transmitter on his premises or person, thereby transmitting the contents of his conversations with suspected criminals to police tape recorders.

Prior to *Katz*, the fourth amendment questions as to informers were controlled by *United States v. On Lee*,[106] which held that government use of informers who may reveal the contents of conversations with an accused does not violate the fourth amendment guarantee against unreasonable searches and seizures. The questions of "consent" were governed by *Lopez v. United States*,[107] which held as constitutional warrantless consent eavesdropping. It was opined by some that the broad preference for search warrants (court-ordered surveillance) expressed in *Katz*[108] would lead the

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[105]

> If America permits fear and its failure to make basic social reforms to excuse police use of secret electronic surveillance, the price will be dear indeed. The practice is incompatible with a free society.

United States v. White, 401 U.S. 745, 764 (1971) (Douglas, J., dissenting), *quoting from* R. CLARK, CRIME IN AMERICA 287 (1970).

[106] 343 U.S. 747 (1952).

[107] 373 U.S. 427 (1963).

[108] 389 U.S. at 357.

Court to reverse itself on these issues and require judicial approval for all electronic eavesdrops.[109]

The signal post-*Katz* decision regarding informers and consent is *United States v. White.*[110] The respondent was convicted of narcotics violations, with incriminating statements made by the defendant admitted at trial. This evidence was obtained by means of warrantless electronic eavesdropping by a government informer during a meeting with the defendant. At trial the informer could not be located, but Judge Hoffman of the Northern District of Illinois overruled objections to the testimony of the agents who listened in on the conversations. The Seventh Circuit, reading *Katz* as overruling *On Lee,* held that the testimony was inadmissible and reversed the conviction.[111]

The Supreme Court, Justice White writing for the majority, in addition to holding that the Seventh Circuit erred in not adjudicating the case by the standards of *On Lee* since *Desist* held *Katz* not retroactive, concluded that the use of agents by law enforcement authorities, who themselves reveal the contents of the conversations with an accused, does not violate the fourth amendment and that *Katz* did not disturb the rationale of *On Lee* and require a different result because the agent uses electronic equipment to transmit the conversation to other agents. The Court narrowly construed *Katz* to fact situations involving no revelations to agents of the government, and the Court further noted that there was no indication in *Katz* that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.[112]

The Court cited *Hoffa v. United States,*[113] which held that an undercover police agent may write down for official use his conversations with a criminal defendant and then testify concerning them without a warrant authorizing his encounters with the defendant and without otherwise violating the defendant's fourth amendment rights.[114] In *White,* the Court said:

> For constitutional purposes, no different result is required if the agent instead of immediately transcribing his con-

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[109]United States v. Bryant, 439 F.2d 642, 644 n.2 (D.C. Cir. 1971).

[110]401 U.S. 745 (1971).

[111]United States v. White, 405 F.2d 838 (7th Cir. 1969).

[112]

> However strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.

401 U.S. at 749.

[113]385 U.S. 293 (1966).

[114]*Id.* at 300-03.

> versations with the defendant either (1) simultaneously records them with electronic equipment he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversation either to recording equipment located elsewhere or to other agents monitoring the transmitter frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversation made by the agent or others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[115]

Thus the majority placed little independent significance upon the presence or absence of electronic surveillance in such cases and instead placed the risk that the conversation will subsequently be divulged upon the party speaking. In other words, there is no reasonable expectation that such conversations will remain private.

Justice Douglas, dissenting in *White*,[116] took the opposite tack and attached great significance to the presence of electronic devices, noting that "electronic surveillance is the greatest leveler of privacy ever known."[117] He advocated that a prior judicial determination be made before any electronic surveillance devices are used at all. In the overall area of electronic surveillance, Justice Douglas found first amendment issues intertwined with the relevant fourth amendment issues.[118]

Justice Harlan, also dissenting in *White*,[119] stated that there was a significant difference between subjecting a person to the risk that participants in a conversation will subsequently divulge the contents of the conversation to others and foisting upon him the risk that unknown third parties may be simultaneously listening in. The *Katz/Berger* line of cases, to Justice Harlan, "left no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited un-

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[115] 401 U.S. at 751 (citations omitted).

[116] *Id.* at 756 (Douglas, J., dissenting).

[117] *Id.* *See also* Cioffi v. United States, 419 U.S. 917, 918-19, *denying cert. to* 493 F.2d 1111 (2d Cir. 1974) (Douglas, J., dissenting).

[118]

> Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste, but is not free if there is surveillance.

401 U.S. at 762 (Douglas, J., dissenting).

[119] *Id.* at 768 (Harlan, J., dissenting).

supervised 'bugging.'"[120] Justice Harlan also advocated the necessity of judicial interposition before electronic surveillance devices could be constitutionally utilized by police in investigations.[121]

The position taken by the majority in *White*, that fourth amendment protection does not extend to "wired informers," was applied to the consensual wiretaps (where one party to a telephone conversation consents to its being monitored and recorded by agents acting without a warrant),[122] even where the consenting party or informer initiated the conversation with the defendant and thus was in a position to shape the conversation.[123]

Although the *White* rationale has been consistently applied by the circuits,[124] both before and after the decision, if one places any importance and independent significance upon electronic surveillance which threatens one of the basic freedoms, privacy, then the *White* rationale misses the mark and mistakes the issue by centering its focus on the interests of a particular person instead of examining the impact of the practice "on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."[125]

To require a court order for any electronic surveillance, as advocated by the dissenters in *White*, would seem to be the next

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[120] *Id.* at 779.

[121]

> The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
>
> This question must, in my view, be answered by addressing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of the Fourth Amendment liberties, I am of the view that more than self-restraint by law officers should be necessary.

Id. at 786 (Harlan, J., dissenting).

[122] Hudson v. United States, 429 F.2d 1311 (5th Cir. 1970), *cert. denied*, 402 U.S. 965 (1971).

[123] Williamson v. United States 450 F.2d 585 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972).

[124] United States v. Buchert, 507 F.2d 629 (3d Cir. 1975); Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973); United States v. Quintana, 457 F.2d 874 (10th Cir. 1972); United States v. Holmes, 452 F.2d 259 (7th Cir. 1971); White v. Schneckloth, 451 F.2d 1317 (9th Cir. 1971); United States v. Caracci, 446 F.2d 173 (5th Cir. 1971); United States v. Anthony, 444 F.2d 484 (9th Cir. 1971); United States v. Skillman, 442 F.2d 542 (8th Cir. 1971); United States v. Smith, 442 F.2d 448 (9th Cir. 1971); United States v. Coley, 441 F.2d 1299 (4th Cir. 1971); United States v. Puchi, 441 F.2d 697 (9th Cir. 1971); United States v. Viviano, 437 F.2d 295 (2d Cir. 1971).

[125] 401 U.S. at 768 n.24 (Harlan, J., dissenting).

logical step in the redefinition of fourth amendment protection and one which would not tip the balance between the twin needs for individual freedom and security and for effective law enforcement measurably away from the interests of law enforcement. Since any surveillance of the wired informer or consensual participant type takes time to gear up, establish contacts or confidences, and set the surveillance into operation, to require a court order for such surveillance would not be such an onerous burden on law enforcement as to outweigh the need for individual security and privacy.

Although *Katz* was a case involving electronic surveillance, the impact of its holding that "what a person knowingly exposes to the public, even in his own home is not a subject of Fourth Amendment protection. . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"[126] goes beyond the electronic surveillance cases and into the area of searches and seizures generally.[127]

2. No Reasonable Expectation Found.—In connection with matters relating to conversations, it is helpful in discerning the scope of the *Katz* holding that "what a person knowingly exposes"[128] to focus on several situations where the circuits have found no reasonable expectation of privacy. In a case involving much popular attention, the Seventh Circuit held that there was no expectation of privacy protected by the fourth amendment as to calls made from mobile telephone units in automobiles, since the calls were exposed to anyone who possessed an FM receiver which could be tuned into the same frequency.[129] Presumably then, there is no reasonable expectation of privacy with respect to any conversation transmitted on any wavelength to which the public or law enforcement has access.

There is no reasonable expectation of privacy as to conversations within a confined area, such as a motel room or telephone booth, which, although intended to be private, are of such volume as to enable the electronically unassisted ear to overhear them.

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[126]389 U.S. at 351-52.

[127]*But cf.* United States v. Wright, 449 F.2d 1355, 1363 (D.C. Cir. 1971) (per curiam). The *Wright* decision would, in effect, constrict the application of *Katz* in situations other than those involving secret electronic surveillance. The court explained that *Katz* broadly hints at a basic principle that the fourth amendment protects from invasions by the police the actions and conversations that the ordinary person would expect to be *strictly* private and escape the perception of others, regardless of location.

[128]389 U.S. at 351-52. The passage is quoted in text accompanying note 126 *supra*.

[129]United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

In such a case, the individual's subjective expectation of privacy is not sufficient to encompass it within the scope of fourth amendment protection.[130] A clear illustration of the reasonable expectation of privacy test was found where the defendant's own thoroughness deprived himself of potential fourth amendment protection.[131] The potential protection was lost because the defendant was made aware of a wiretap on his line through a contact at the telephone company. The Second Circuit said, "It is incongruous therefore to advert to an expectancy of privacy . . . ."[132] These cases serve to lend further meaning to the objective and subjective standards of the *Katz* test if one is to attack the problem using Justice Harlan's approach.

Utilizing the Harlan criteria for determining the existence of a reasonable expectation of privacy, the Ninth Circuit held that a prisoner in a jail cell has no reason to consider such area private, and thus, although the prisoner had exhibited the requisite subjective intent, his expectation was not reasonable under the circumstances.[133] The reasoning of the Supreme Court in *Lanza v. New York*[134] mandated such a conclusion. In *Lanza,* the Court noted that "it is obvious that a jail cell shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."[135] Although the force of *Lanza* in this context might appear to be eroded since "the Fourth Amendment protects people, not places,"[136] *Lanza,* as applied in this context, bears upon the objective determination of reasonableness. The Ninth Circuit also came to the same conclusion as to conversations between co-defendants positioned in a police station interrogation room, finding no ex-

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[130]United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973); United States v. Elder, 446 F.2d 587 (9th Cir. 1971); United States v. Fuller, 441 F.2d 755 (4th Cir. 1971). In *Fisch,* the Ninth Circuit couched its opinion in the following terms:

> Upon balance, appraising the public and private interests here involved, we are satisfied that the expectations of the defendants as to their privacy, even were such expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement. In sum, there has been no justifiable reliance, the expectation of privacy not being "one that society is prepared to recognize as reasonable."

474 F.2d at 1078-79.

[131]United States v. Bynum, 485 F.2d 490 (2d Cir. 1973).

[132]*Id.* at 501.

[133]United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972). *See also* United States v. Savage, 482 F.2d 1371 (9th Cir. 1973); United States v. Kelley, 393 F. Supp. 755 (W.D. Okla. 1975).

[134]370 U.S. 139 (1962).

[135]*Id.* at 143.

[136]389 U.S. at 351.

pectation of privacy.[137] However, the question remains whether there can be a constitutionally protected expectation of privacy as to the conversations between a prisoner and a person visiting him.[138]

3. Reasonable Expectations on Government Property.—Two other cases, however, illustrate when one may entertain a justifiable expectation of privacy on government property. In one, the Fifth Circuit held that a university regulation authorizing entry into student dormitory rooms for purposes of making a search was constitutional so long as the search was limited in its application to the furtherance of the university's function as an educational instition. Once the regulation was applied so as to authorize a search of rooms for criminal evidence, however, it was found to constitute an unreasonable attempt to require students to waive their fourth amendment protection as a condition to their occupancy of rooms.[139] Although the decision is more applicable to and is based upon questions of waiver of rights, the undertones of *Katz* and privacy are evident in this decision. The decision also demonstrates a fine line on one side of which expectations of privacy will not be considered reasonable as they have been effectively waived, and on the other side of which the students' expectation of privacy may warrant protection notwithstanding the waiver.

In a liberal application of *Katz*, the Seventh Circuit held that the fourth amendment prohibited the receipt of evidence obtained through an electronic listening device placed, without a warrant, to overhear conversations of a government employee in his office.[140] The court said, "The key is whether the defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the conversation took place in an Internal Revenue Service office."[141] Quoting *Katz*, the Seventh Circuit continued, "The Fourth Amendment applies 'wherever a man may be.' "[142]

4. Spatial Considerations and the Reasonable Expectation Standard.—The Seventh Circuit also dealt with another post-*Katz* spatial question in *United States v. Case*.[143] Government agents overheard conversations among the defendants who were behind closed doors in a print shop. The agents were stationed in a nonpublic hallway in the building in which the print shop was located.

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[137]Williams v. Nelson, 457 F.2d 376 (9th Cir. 1972).

[138]Christman v. Skinner, 468 F.2d 723, 729 (2d Cir. 1973) (Feinberg, J., concurring in part, dissenting in part).

[139]Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

[140]United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968).

[141]*Id.* at 716.

[142]*Id., quoting from* 389 U.S. at 359.

[143]435 F.2d 766 (7th Cir. 1970).

The court accepted the finding of the trial court that the hallway where the agents overhearing the conversations were stationed either was private in that the agents had to get a key from the landlord in order to obtain access to the hallway or, in the alternative, that the hallway was not such a public area as to consider it not protected. Applying *Katz,* the Seventh Circuit found that the surreptitious listening by the agents in the hallway invaded the defendants' right to privacy in that the defendants subjectively sought to keep their conversations private and, as to the objective consideration, that the defendants could not have reasonably expected that the agents would have so positioned themselves. Quoting from an earlier case decided in the same circuit, the court said. " 'One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion . . .' "[144] It seems that the Seventh Circuit has taken an approach slightly more oriented to the privacy side of the balance between privacy and law enforcement than the approaches of the other circuits.[145] However, neither approach is to be faulted on either conceptual or policy grounds as it must be remembered that the *Katz* standard is a vague test depending greatly on context and that even though *Katz* might well be considered a pro-privacy decision, its underlying rationale is to effect a balance between the personal interest in privacy and the public interest in effective law enforcement.

Although *Terry v. Ohio*[146] firmly established that the "right of personal security belongs as much to the citizens on the streets of our cities as to the homeowner closeted in his study to dispose of his personal affairs,"[147] the fourth amendment "is not a shield against the inevitable loss of privacy which accompanies one's decision to go out into the world and mingle with his fellow man."[148] Thus, a visitor in someone else's home is not protected from the risk that the owner will consent to the entry of the police.[149] His expectation of privacy in such circumstances is not reasonable.[150] The expectations of privacy asserted in the house of complete strangers as to intercepted oral communications were not reasonable when the defendants had made several suspicious visits to the premises and had obtained entry by false representations.[151]

[144] *Id.* at 768, *quoting from* United States v. Haden, 397 F.2d 460, 464 (7th Cir. 1968).

[145] See text accompanying notes 127-37 *supra.*

[146] 392 U.S. 1 (1968).

[147] *Id.* at 9.

[148] Bowles v. United States, 439 F.2d 536, 540 (D.C. Cir. 1970). *But cf.* Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975).

[149] 439 F.2d at 540-41.

[150] See text accompanying notes 109-24 *supra.*

[151] United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973).

In a private club, no expectation of privacy reasonably existed when the doors were not locked and no doorman was present to bar the entry of nonmembers and where the members had acquiesced in the entry of detectives on two previous occasions.[152] Seemingly then, one's expectation of privacy becomes less reasonable the further he ventures from his own abode. This reasoning is, in fact, quite logical and rests on centuries of experience. Even though *Katz* rejected the "trespass doctrine" of *Olmstead,* the rejected property concepts retain considerable vitality in determining the objective reasonableness of one's expectation of privacy.

Another fourth amendment area in which the *Katz* doctrine has found considerable application and impact is that of abandonment of physical evidence. In *United States v. Stroble,*[153] *Katz* was used to establish the admissibility of inventory tags left lying by the side of garbage cans adjacent to the street curb and observed by police while they were still on a public street. The Sixth Circuit found that there can be no reasonable expectation of privacy in respect to such items when they are left in such a manner as to place them in "plain view."[154] The exposure of physical evidence to the plain view of the public indicates such a lack of expectation of privacy that to seize it is inoffensive to the constitutional protection of the fourth amendment.[155] The California Supreme Court took the opposite view, however, and, citing *Katz* as authority, upheld a citizen's expectation of privacy as to the contents of a trash can placed on a public sidewalk awaiting pickup by municipal trash collectors.[156] The First Circuit rejected this application, stating that "[i]mplicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned."[157] The rationale of the First Circuit has been applied to automobiles abandoned on public highways[158] and to parcels left on sidewalks which contained tangible evidence seized by police officers in the course of duty.[159] The right to fourth amendment protection of property against unreasonable search and seizure is lost when property is abandoned. Further, the same reasoning has been extended to situations where the particular item in question has

[152]Ouimette v. Howard, 468 F.2d 1363 (1st Cir. 1972).

[153]431 F.2d 1273 (6th Cir. 1970).

[154]*Id.* at 1276. *See also* United States v. Johnson, 469 F.2d 970 (1st Cir. 1972); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971).

[155]Smith v. Slayton, 484 F.2d 1188, 1190 (4th Cir. 1973).

[156]People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 67 (1971), *vacated*, 409 U.S. 33 (1972).

[157]United States v. Johnson, 469 F.2d 970, 972 (1st Cir. 1972).

[158]United States v. Edwards, 441 F.2d 749 (5th Cir. 1971).

[159]United States v. Colbert, 474 F.2d 749 (5th Cir. 1973).

been sold[160] or loaned[161] to another; once possession of the property has been relinquished there can be no legitimate continuing expectation of privacy as to the item.[162] Similarly, even where contrabrand was secreted on wastelands to such an extent that it could not be argued that it was abandoned, the reasonableness of searches of boxes containing the contraband did not depend upon the subjective intent of the party who secreted the contraband, but rather was determined by the objective reasonableness of the expectation that no one would find the boxes. The court found that the only justified expectation was that the property would remain secure against intrusion only so long as it remained undiscovered.[163]

The Supreme Court has held that writing[164] and speech[165] exemplars are without the scope of fourth amendment protection. These holdings are based on the *Katz* reasoning that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[166] Since handwriting and speech are constantly exposed to the public, there can be no reasonable expectation of privacy as to the characteristics of one's handwriting or voice pattern.

5. The Katz *Standard and National Security.*—A question left open by the majority in *Katz* concerned the standards governing the constitutionality of electronic surveillance in connection with gathering intelligence information necessary for the conduct of international affairs and protection of national security.[167] Justice White was of the opinion that such surveillance was not violative of the fourth amendment if the President or Attorney General authorized the surveillance after considering the requirements of national security.[168] The Court addressed itself to the issue[169] in *United States v. United States District Court.*[170] Three defendants were

[160]Brown v. Brierly, 438 F.2d 954 (3d Cir. 1971).

[161]Nelson v. Moore, 479 F.2d 1192 (1st Cir. 1972).

[162]The proper test for abandonment is not whether all formal rights have been relinquished, but whether the relinquishing party retains a reasonable expectation of privacy in the articles alleged to be abandoned. United States v. Wilson, 472 F.2d 901 (9th Cir. 1972). The cases, however, bear out that when the property is abandoned, there is no reasonable expectation of privacy.

[163]United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972).

[164]United States v. Johnson, 410 U.S. 19 (1973).

[165]United States v. Dionisio, 410 U.S. 1 (1973).

[166]389 U.S. at 351-52.

[167]*Id.* at 358 n.3.

[168]*Id.* at 367 (White, J., concurring).

[169]The *Katz* Court framed the issue as whether safeguards other than prior authorization by a magistrate would satisfy the fourth amendment in a situation involving the national security. *Id.* at 358 n.3.

[170]407 U.S. 297 (1971).

charged with conspiracy to destroy government property.[171] At pretrial, the defendants moved to compel the Government to disclose electronic surveillance information and for the court to conduct a hearing to determine whether the information obtained from the surveillance "tainted" the information upon which the indictment was based. In response, the Government filed an affidavit acknowledging that there was electronic surveillance and that the Attorney General had approved the wiretaps. The contention of the Government was that the surveillance was lawful as a reasonable exercise of the President's power to protect the national security even though it was conducted without the prior judicial approval that *Katz, Berger,* and Title III would require. The district court ruled that the surveillance violated the fourth amendment rights of the defendants.

The Government then moved for a writ of mandamus in the Sixth Circuit to vacate the order of the district court directing the Government to make a full disclosure of the monitored conversations. The Sixth Circuit held that when dealing with the threat of domestic subversion, the executive branch is subject to fourth amendment limitations on electronic surveillance,[172] rejecting the argument of the Government that such procedure was within the inherent executive power.[173]

When the case reached the Supreme Court, the decision turned on the application of Title III to the national security context as related to the inherent powers of the executive branch. Justice Powell, writing for the Court, found that Title III[174] conferred no such power but was merely intended to provide that the Act[175] was not to

[171]18 U.S.C. § 371 (1970).

[172]United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971).

[173]The Sixth Circuit, in rejecting the "inherent power" argument, made these telling remarks:

> An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of the abusive searches and seizures directed against the American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon the "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.
>
> It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this nation overthrew King George's reign.

Id. at 665.

[174]Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970).

[175]18 U.S.C. § 2511(3) (1970).

be interpreted to limit or disturb whatever powers the executive branch may have under article II of the Constitution. Finding that the fourth amendment freedoms could not be adequately guaranteed if electronic surveillance for domestic security purposes could be conducted solely within the discretion of the executive branch, the Court held that the shields protecting private speech, as set forth in *Katz* and *Berger,* must apply in the national security context.[176] The Court utilized the balancing process running throughout the *Katz* related cases, substituting safeguarding the domestic security for the need for effective law enforcement. The Court thus posed the question: "[W]hether the needs of citizens for privacy and free expression may not be protected by requiring a warrant [from a neutral and detached magistrate] before such surveillance is undertaken."[177] Answering in the affirmative, the Court, using a balancing approach with an historical bent, said, "[U]nreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."[178]

IV. Conclusion

Katz must be viewed as both a milestone and a touchstone. *Katz* must be considered a milestone in that it rejected the property-based analysis of *Olmstead* and returned to an approach based more upon the theoretical intent of the Framers. *Katz* must also be viewed as a touchstone in that the standards for fourth amendment protection enunciated in the decision were relatively void of clear content which would make application of the reasonable expectation standard mechanical, and, therefore, the application and refinement of the standard were left for future determination to fit the context in which they arise.

The decisions construing *Katz* and its progeny, although they may seem to be superficially at odds, still bear out the underlying thrust of the *Katz* decision—the necessity of finding a contemporary balance between the personal interest in privacy or security and the broad public interest in effective law enforcement.

Since *Katz* and *Berger* can be considered as standards enabling legal protection to conform to changing times and technology, the reasonable expectation standard should be able to withstand the tests of time and continue to evolve, meeting, in application, the demands and necessities of succeeding generations. Just as *Katz* arose out of the necessity of redefining fourth amendment protection in light of extensive use of electronic surveillance techniques

[176] 407 U.S. at 313-16.

[177] *Id.* at 315.

[178] *Id.* at 317.

and the invasion into private lives which the use of such techniques entails, so might a further redefinition be necessary if some unforeseen development constricts the scope of the reasonable expectation standard when viewed against the vague constant of "privacy." However, given the intended abstractness of the *Katz* standard, it seems that a further redefinition would not be warranted unless future developments rob the *Katz* focus of any meaning in relation to the concepts embodied in the fourth amendment. It is to be expected, therefore, that the standard of the reasonable expectation of privacy set forth in *Katz v. United States* will continue to be the signal consideration as to unreasonable searches and seizures well into the future.

JOHN W. BOYD

Family Income Shifting Within the Subchapter S Corporation

I. Introduction

Individual taxpayers are acutely aware of the progressive income tax. The tax varies from 14 percent to 70 percent of taxable income.[1] This progressive rate structure provides a strong incentive for income shifting within a family. If income can be shifted from a high tax bracket family member to a lower one, the family unit's aggregate tax liability will be reduced. Therefore, the family unit increases its after-tax income. The possibility of substantial tax saving via income shifting has stimulated the use of various devices to accomplish this objective.[2] This Note will examine the advisability of using the subchapter S corporation[3] to shift income within the family. The following example demonstrates the potential tax savings. *F*, the principal shareholder in a subchapter S corporation, transfers stock to his children or grandchildren. A transfer of stock which produces a shift of $5,000 of income from *F* in a high tax bracket to a minor child with no other income would result in a significant tax saving in a single year.[4] If this yearly tax saving is multiplied by ten or fifteen years, the tax saving for the family can accumulate to a substantial sum. However, there are potential problems since the Commissioner of Internal Revenue has counter-weapons to prevent any tax evasion schemes.[5] Nevertheless, tax saving can be attained if certain precautions are heeded. To understand what is permissible and what is not, a general review of income assignment is helpful.

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[1] Int. Rev. Code of 1954, § 1.

[2] *See, e.g.*, Klaus, *Tax Considerations in Choice of Family Organization*, 20 Okla. L. Rev. 35 (1967); Malone, *Income Splitting as a Means of Avoiding Taxes*, 19 Vand. L. Rev. 1289 (1966); Propp, *Spreading the Family Income*, 50 Taxes 197 (1972). Some of the more popular tax shifting devices have included the family partnership, corporation, trust, joint ownership, family employment, gift (or sale) and leaseback, joint venture, and interest free loans.

[3] Int. Rev. Code of 1954, §§ 1371-79. The popularity of the subchapter S corporation is primarily due to the absence of a corporate tax. The corporation is a mere conduit for earnings which are passed on to shareholders. Taxable income is realized only when the dividends are actually or constructively received by the shareholder.

[4] *Cf.* Int. Rev. Code of 1954, § 1. The magnitude of the saving depends upon the relative tax brackets of the father and child.

[5] The Commissioner is empowered to reallocate income, deductions, and credits to prevent evasion of taxes or to clearly reflect income. Int. Rev. Code of 1954, §§ 482, 1375(c).

II. Income Assignment Generally

The Commissioner for many years has vigorously opposed taxpayer efforts to reduce tax liability by assignment of income.[6] A favorite scheme of taxpayers was to contractually assign the right to future earnings to a minor child. By such assignment the taxpayer hoped to remove earnings from his gross income by shifting it to the gross income of a family member in a lower tax bracket. If successful, a substantial tax saving was realized. Because of the potentially large tax saving, it was only a matter of time before the Supreme Court eventually addressed the issue of income assignment. The inevitable occurred in the landmark case of *Lucas v. Earl.*[7] Mr. and Mrs. Lucas had entered into a contractual agreement under which all acquisitions of both parties were to be owned equally, including income from personal services. Nevertheless, the Supreme Court held that all of Mr. Lucas' salary and fees were attributable to him for tax purposes. The *Lucas* case established the principle that an anticipatory assignment of future earnings would be ineffective to shift the tax burden.[8]

Despite *Lucas,* taxpayers continued to be fascinated with the potential tax saving inherent in assignment of income schemes, and ingenious techniques were devised to shift income to low tax bracket family members. The Commissioner, armed with *Lucas,* vigorously resisted such efforts. One decade after *Lucas,* the issue of assignment of income was again before the Supreme Court in *Helvering v. Horst.*[9] Horst was the owner of interest-bearing coupon bonds. As the coupons matured, he would redeem them for interest income. Because he was in a higher tax bracket than his minor son, Mr. Horst transferred the unmatured coupons to his son and directed that interest payments be made to his son. The Commissioner objected to this tax saving arrangement on the grounds of *Lucas.* The Supreme Court agreed with the Commissioner and held that the father's transfer of the unmatured bond interest coupon to his son was insufficient to transfer the tax burden on the interest income. Perhaps the most enlightening part of the opinion was a statement by Mr. Justice Stone, writing for the Court.

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[6] *See generally* Rice, *Judicial Trends in Gratuitous Assignments to Avoid Federal Income Taxes,* 64 Yale L.J. 991 (1955).

[7] 281 U.S. 111 (1930).

[8] *Id.* at 114. *See also* Burnet v. Leininger, 285 U.S. 136 (1932) (disallowing a purported assignment to the taxpayer's wife of a one-half share in his interest in a partnership). *Lucas* is perhaps best remembered by the fruit and tree metaphor: "[N]o distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." 281 U.S. at 115.

[9] 311 U.S. 112 (1940).

> The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid.[10]

The Court concluded that even though Mr. Horst had directed that payment be made to his son, he had created the right to receive the payment. Therefore, he had to bear the tax burden of the coupon interest income.

Taxpayers also experimented with short-term trusts as an income assignment device. In a typical arrangement, a high tax bracket settlor conveyed income-producing corpus to a trustee, named a minor child or wife as beneficiary, but retained the power to revoke. The high tax bracket settlor reasoned that as long as the beneficiary received the income from the trust, the beneficiary would be the taxable entity and not the settlor, and, since the beneficiary was in a lower tax bracket than the settlor, a tax saving would be realized. Again, the Commissioner, relying on *Lucas*, perceived the short-term trust as merely another impermissible income-assignment device. The Supreme Court resolved the short-term trust issue in *Helvering v. Clifford.*[11] Mr. Clifford was the settlor of a five year *inter vivos* trust. He named his wife beneficiary but retained a substantial degree of control over the corpus. Mr. Clifford contended that the beneficial owner (his wife) was the taxable entity . The Court rejected this argument, holding that even though the settlor was not the apparent owner of the corpus, he remained the taxable entity because he retained too much control over the corpus. Therefore, Mr. Clifford, and not his wife, was taxed on the trust income. Unfortunately, the Court did not establish any clear standards for determining under what conditions, if any, trust income would not be taxable to the settlor. Much uncertainty was resolved by the "Clifford Rules" in the Internal Revenue Code of 1954.[12] Generally, these rules provide that the settlor will be taxed on trust income of any portion of corpus in which he has a reversionary interest that may take effect within ten years after the last transfer to the trust.[13] In addition, if the settlor retains the sole power to control the disposition of either income or corpus, he will be taxed on the trust income.[14] If he

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[10] *Id.* at 119.

[11] 309 U.S. 331 (1940). The settlor retained the power to sell the corpus, to reinvest the income, or to pay over to the beneficiary as he alone might choose.

[12] INT. REV. CODE OF 1954, §§ 671-78.

[13] *Id.* § 673(a).

[14] *Id.* § 674(a).

retains various other types of control, he will also be taxed.[15] Thus, income assignment via the short-term trust is perilous. However, such trusts can yield significant tax saving by shifting income in certain limited factual settings.[16]

The income assignment area continues to be the source of much controversy.[17] Upon this controversial background, a new concept was added to the tax law—the subchapter S corporation.[18] Arguably, subchapter S is particularly adapted to facilitate the assignment of income, especially within the context of a family.

III. Subchapter S Corporation

Since the inception of the federal tax on corporate income[19] in 1909,[20] the theory and rationale of the tax and its relationship to the individual income tax have been subjects of controversy.[21] In his 1954 Budget Message to the 83d Congress, President Eisenhower recommended legislation permitting certain corporations to escape the corporate income tax because, in his view,

> [s]mall businesses should be able to operate under whatever form of organization is desirable for their particular circumstances, without incurring unnecessary tax penalties.[22]

The President's proposal encountered much opposition. Nevertheless, four years later Congress adopted the proposal as a part of the Technical Amendments Act of 1958.[23] The newly adopted

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[15] *Id.* §§ 675-77.

[16] Propp, *Spreading the Family Income*, 50 Taxes 197, 203 (1972). *See generally* Barnett, *Short-Term Trusts Are Not Dead!*, 3 Tax Advisor 80 (1972); Weinstock, *The Short Term Trust: A Worthwhile Tax Saving Tool*, 50 Taxes 153 (1972).

[17] *See, e.g.*, Ferrer v. Commissioner, 304 F.2d 125 (2d Cir. 1962), *discussed in* Eustice, *Contract Rights, Capital Gain and Assignment of Income: The* Ferrer *Case*, 20 Tax L. Rev. 1 (1962). *See generally* Malone, *Income Splitting as a Means of Avoiding Taxes*, 19 Vand. L. Rev. 1289 (1966).

[18] Int. Rev. Code of 1954, §§ 1371-78. *See* note 3 *supra*.

[19] Int. Rev. Code of 1954, § 11.

[20] Payne-Aldrich Tariff Act of 1909, 36 Stat. 11. An earlier corporate income tax, enacted in 1894, was held unconstitutional in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895), on the ground that a federal tax on income from real and personal property was a direct tax requiring apportionment among the states on the basis of population. *See* U.S. Const. art. I, § 9, cl. 4.

[21] *See, e.g.*, Tax Institute of America, How Shall Business Be Taxed? (A. Alvord, ed. 1937).

[22] 100 Cong. Rec. 571 (1954) (tax recommendations in Budget Message of Jan. 21, 1954).

[23] Act of September 2, 1958, Pub. L. No. 85-866, tit. I, § 64(a), 72 Stat. 1650.

statute provided for what has become popularly referred to as the subchapter S corporation.[24] Except for certain capital gains income,[25] a subchapter S corporation does not pay federal income tax although it is a corporation for all other purposes. Thus, the double taxation of corporate earnings is avoided.[26] Also, some states, including Indiana, give deference to the subchapter S concept and do not levy a state corporate income tax.[27] Thus, the subchapter S election has become very popular[28] among eligible[29] corporations.

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[24]INT. REV. CODE OF 1954, §§ 1371-78. For a discussion of subschapter S, see 7 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION ch. 41B (1967); Coplin, *Subchapter S—Election of Small Business Corporations*, 51 KY. L.J. 308 (1962); Coplin, *Partnership or S Corporation? A Check List of the Tax Factors in the Choice*, 12 J. TAXATION 32 (1960); Cunningham, *Subchapter S Corporations: Uses, Abuses, and Some Pitfalls*, 20 MD. L. REV. 195 (1960); Lebrun, *Subchapter S Corporations*, 39 N.D.L. REV. 341 (1963); Moore & Sorlien, *Adventures in Subchapter S and Section 1244*, 14 TAX L. REV. 453 (1959); Note, *Optional Taxation of Closely Held Corporations Under the Technical Amendments Act of 1958*, 72 HARV. L. REV. 710 (1959).

[25]INT. REV. CODE OF 1954, § 1378. Generally, the corporation is liable for the tax only if the taxable income of the corporation for the year is more than $25,000, and the excess of net long-term capital gain over net short-term capital loss is *both* more than $25,000 and more than 50 percent of taxable income. Treas. Reg. § 1.1378-2 (1968).

[26]*See* INT. REV. CODE OF 1954, §§ 1372(b), 1373(a)-(b). Earnings of a regular corporation are taxed at the corporate level, *id.* § 11, and again at the individual level, *id.* § 61(a)(7), with the exception of the $100 exclusion, *id.* § 116.

[27]IND. CODE § 6-3-2-3(b) (Burns 1972) (Adjusted Gross Income); *id.* § 6-3-7-1(a) (Gross Income Tax); *id.* § 6-3-8-1 (Supplemental Net Income Tax). The Indiana Department of Revenue has provided that

> [s]mall business corporations are generally not subject to the Gross Income Tax Act, the Adjusted Gross Income Tax Act, *or the Supplemental Net Income Tax Act*, if they have elected to file as a small business corporation for federal income tax purposes under section 1372 of the Internal Revenue Code.

INDIANA DEP'T OF REVENUE, CIRCULAR IT-18 (May 1, 1974 rev.) (emphasis in original and citations omitted).

[28]*See* U.S. TREASURY DEP'T, STATISTICS OF INCOME, BUSINESS INCOME TAX RETURNS 3 (1972). These statistics indicate that more than 14 percent of the corporations reporting for income tax purposes in 1969 had made the subchapter S election.

[29]INT. REV. CODE OF 1954, § 1372. Generally, an eligible corporation is one that meets the following requirements: (1) It must be a domestic corporation; (2) there must be no more than ten shareholders; (3) all shareholders must be individuals or decedents' estates; (4) no nonresident alien may be a shareholder; (5) the corporation may not have more than one class of stock; (6) the corporation cannot receive more than 80 percent of its gross receipts from sources outside the United States; (7) the corporation cannot receive more than 20 percent of its gross receipts from interest, dividends, rents, royalties, annuities, and gains from sales or exchanges of securities, and (8) all shareholders must consent to the election. For a general discussion of eligibility

In addition to avoiding double taxation, subchapter S offers other advantages to the family business enterprise. Subchapter S arguably condones certain types of income shifting which can substantially reduce the family unit's aggregate income tax liability. Two basic questions arise: (1) What income shifting devices are available to a family business that is operating in the subchapter S legal structure? (2) Is there a solid legal basis for employing these income shifting devices? Attention herein is directed to these basic questions.

A. Constructive Dividend

The constructive dividend provision of subchapter S appears to open the door to limitless assignments of income. Much of what the Commissioner had fought for and won in *Lucas v. Earl*[30] and *Helvering v. Horst*[31] may have been subverted by section 1373(b) of the Internal Revenue Code of 1954, which provides in part:

> Each person who is a shareholder of an electing small business corporation on the *last day* of a taxable year of such corporation shall include in his gross income, for his taxable year in which or with which the taxable year of the corporation ends, the amount he would have received as a dividend, if on such last day there had been distributed pro rata to its shareholders by such corporation an amount equal to the corporation's undistributed taxable income for the corporation's taxable year.[32]

By merely varying the identity of persons holding the stock of the corporation on the last day of its taxable year, the constructive dividend provision allows taxpayers to freely shift income. This provision is especially appealing to family enterprises. Consider the following situation. A shareholder father owns all the stock of a subchapter S corporation. Near the end of the corporation's taxable year, the accountant reports that the corporation's taxable

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requirements, see B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 6.02, at 6-5 (abr. ed. 1971) [hereinafter cited as BITTKER & EUSTICE]; Ekman, *Subchapter S: Problems of Election and Terminations*, 1970 N.Y.U. 28TH INST. ON FED. TAX. 475; Odmark, *A Practitioner's Guide to Subchapter S Planning Opportunities and Pitfalls*, 30 J. TAXATION 360 (1969).

[30]281 U.S. 111 (1930).

[31]311 U.S. 112 (1940).

[32]INT. REV. CODE OF 1954, § 1373(b) (emphasis added). Subsections 1373(c) and (d) define undistributed taxable income as taxable income (without regard to the net operating loss deduction or to the deductions allowed by sections 241 to 247) less the section 1378 tax on capital gains and less actual distributions from current earnings and profits. See note 25 *supra*.

income for the year will be approximately $100,000. This income places the father in a high tax bracket. If he shifts the ownership of stock, by sale or gift, to his minor children by the *last* day of the corporation's taxable year, he effectively shifts the dividends and the consequent tax burden to a lower tax bracket taxpayer. Thus, a substantial tax saving accrues to the family unit. However, a substantial gift of stock may cause gift tax consequence to the father.[33]

On first impression, the constructive dividend feature might appear to be a congressional oversight. Apparently not, however, for a different method was devised to apportion a corporate net operating loss among shareholders. Losses are apportioned pro rata according to the length of time the particular shareholder owned his stock.[34] An example will highlight the difference in treatment of dividends and losses. *F* is the sole shareholder of a subchapter S corporation. He transfers stock to *M* prior to the end of the corporation's taxable year. If the corporation has taxable income for the year, the constructive dividend feature of section 1373(b) imputes all the dividend income to *M*, for he held the stock on the last day of the corporation's taxable year. But, if the corporation was less successful and had experienced a net operating loss, only 1/365 of the loss would pass through to *M*, for he held stock only 1/365 of the corporation's taxable year. Why did Congress provide for such disparate treatment? No reason is found in the statute, regulations, or legislative history. Perhaps it is a matter of simplicity and administrative convenience to impute dividends to the owner of stock held on the last day of the corporation's taxable year. But if administrative convenience is the reason, why were losses not allocated similarly? This question has been raised by commentators, and corrective legislation has been suggested to solve the disparate treatment features.[35] Nevertheless, Congress to date has not removed this loophole. The undistributed taxable income of a subchapter S corporation continues to be taxed to persons holding its stock on the last day of the corporation's taxable year.

The constructive dividend device appears to be a relatively safe way to split income among family members. However, the Commissioner is not entirely weaponless. A Treasury Regulation provides that a donee or purchaser of stock in a subchapter S corporation will not be regarded as such unless he acquires the

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[33] INT. REV. CODE OF 1954, § 2501.

[34] *Id.* § 1374(a). The corporation's net operating loss is prorated and passed through to each shareholder as a deduction against other income of the shareholder. The pro rata share is a function of the shareholder's interest in the corporation and the length of time he held his interest in the corporation during that taxable year.

[35] Caplin, *Subchapter S vs. Partnership: A Proposed Legislative Program*, 46 VA. L. REV. 61, 81 (1960).

stock in a bona fide transaction.[36] The Regulation adds the additional warning that family transactions will be closely scrutinized. The Tax Court had an opportunity to apply this Regulation in *Henry D. Duarte.*[37] In *Duarte,* the sole owner of a subchapter S corporation purported to transfer 50 percent of the stock to his minor children. Subsequently, all dividends, actual and constructive, were reported on the corporation's information returns and on the individual returns of the father and his two minor children. The transfer was in compliance with the New York Uniform Gifts to Minors Act,[38] with the mother serving as custodian of the stock. Additionally, the father filed a gift tax return, although there was no gift tax liability. Nevertheless, the Commissioner argued, and the court held, that the gift was not a bona fide transfer for purposes of federal income taxation. The court noted that neither child had actually received the dividends. At all times the father had exercised complete dominion over both the corporation and the dividends. The court, in support of its conclusion, alluded to the substance versus form dichotomy—if a transaction is complete in form but lacks substance, it will not be recognized as effective for income tax purposes.[39] Thus, after the *Duarte* decision, it is clear that if income splitting among family members is to be effective, there must be a bona fide transfer of stock. Further, the Commissioner has a procedural advantage since the burden of proving a bona fide transfer is on the taxpayer.[40]

Another pitfall to be aware of when transferring shares of a subchapter S corporation to family members is that the right to receive distributions of previously taxed income (PTI) is not transferable.[41] A basic feature of subchapter S is that earnings are imputed to shareholders at the end of each year for tax purposes, regardless of whether or not dividends are actually distributed. Subsequently, when the shareholder receives his PTI, the distribution to him is nontaxable. However, the right to receive PTI without realizing income is personal to the shareholder who

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[36] A donee or purchaser of stock in the corporation is not considered a shareholder unless such stock is acquired in a bona fide transaction and the donee or purchaser is the real owner of such stock. The circumstances, not only as of the time of the purported transfer but also during the periods preceding and following it, will be taken into consideration in determining the bona fides of the transfer. Transactions between members of a family will be closely scrutinized. Treas. Reg. § 1.1373-1(a)(2) (1959).

[37] 44 T.C. 193 (1965). *See* Michael F. Beirne, 52 T.C. 210 (1969).

[38] N.Y. Est., Powers & Trusts §§ 7-4.1 to -4.10 (McKinney 1967).

[39] 44 T.C. at 197. *Accord,* Gregory v. Helvering, 293 U.S. 465 (1935).

[40] 44 T.C. at 197.

[41] Int. Rev. Code of 1954, § 1375(d)(1); Treas. Reg. § 1.1375-4(e) (1959).

owned the stock when the PTI accrued. If the stockholder transfers the stock without having actually received his PTI, the transferee does not acquire the right to do so.[42] A distribution to the transferee is treated as a taxable dividend. Thus, only current and future earnings will be shifted to the lower tax bracket family member. The inability to transfer PTI tax free limits the flexibility of a subchapter S corporation for income shifting purposes.

If the transfer of stock to a family member is by way of a gift, a gift tax liability may arise.[43] Any taxable gift would reduce the potential income tax savings but would decrease the donor's taxable estate and thus reduce estate taxes upon the donor's death.[44] Also, a gift of closely held corporation stock invariably presents valuation problems.[45] Clearly, all three taxes must be considered by the tax planner.

In summary, the constructive dividend peculiar to subchapter S can be successfully employed to minimize the family's aggregate tax liability. Success will depend upon a bona fide transfer of the stock. Other problems include the transferor's burden of proving a bona fide transfer, the loss of the right to receive any PTI tax free, and gift tax and valuation problems.

B. Minimum Reasonable Salary

Another possible technique for shifting income within a family enterprise using a subchapter S corporation is to compensate the father-shareholder-employee with the minimum reasonable salary. The payment of a low salary leaves more earnings and profits to be distributed to other family member shareholders, either as actual or constructive dividends.[46] This technique can effectively shift income from a father in a high tax bracket to his children in lower tax brackets. For example, assume that there is a range of reasonable annual salaries for the shareholder-employee from $15,000 to $30,000. The payment of the lowest reasonable salary accomplishes two objectives: (1) Less income goes into the high tax bracket shareholder-employee's gross income, and (2) more income remains available for distribution by the corporation to family

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[42]A transferor who later reacquires stock in the corporation during the same uninterrupted election may then employ his old PTI account. To this extent his right to receive PTI is not lost. Treas. Reg. § 1.1375-4(e) (1959).

[43]*Cf.* INT. REV. CODE OF 1954, § 2501.

[44]*Cf. id.* §§ 2001-2207.

[45]Jacobowitz, *Is Subchapter S a Viable Planning Tool?*, 1971 N.Y.U. 29TH INST. ON FED. TAX. 1373, 1395.

[46]*Cf.* INT. REV. CODE OF 1954, § 1373(d). A deduction for salaries is authorized by subsection 162(a)(1). The salary deduction is taken in arriving at the corporation's taxable income.

shareholders in lower tax brackets. The net result is an aggregate tax saving for the family unit. For example, by shifting $15,000 from the father who is in the 50 percent tax bracket to other family members in the 25 percent tax bracket, the tax liability is reduced from $7,500 to $3,750—a tax saving of $3,750.

The above noted feature of a subchapter S corporation is markedly different from a regular (subchapter C) corporation. A shareholder-employee of a regular corporation wants to be paid the *largest* reasonable salary. Furthermore, as the salary increases, the amount of earnings and profits subject to the corporate tax decreases.[47] In fact, the corporate tax can be avoided entirely if salaries and other reasonable corporate expenses totally exhaust earnings and profits of a regular corporation.[48]

Section 1375(c) imposes a restriction on the shifting of income within a subchapter S corporation by requiring the payment of a minimum salary to the high tax bracket shareholder-employee. This section gives the Commissioner the power to reallocate distributions among shareholders of a corporation who are members of the recipient's family if such allocation is "necessary in order to reflect the value of services rendered to the corporation by such shareholders."[49] Thus, if an unreasonably low salary is paid to the shareholder-employee, additional income may be allocated to him by the Commissioner from dividends that otherwise would have been shifted to other members of his family. Of course, if such reallocation occurs, income shifting and the accompanying tax saving will have been frustrated. This possibility was made clear to taxpayers by the case of *Pat Krahenbuhl*.[50] In that case the father made bona fide transfers of shares of his solely-owned subchapter S corporation to his four minor children under the Alabama Uniform Gifts to Minors Act.[51] In the subsequent two

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[47] *Cf.* INT. REV. CODE OF 1954, § 11.

[48] Klaus, *Tax Considerations in Choice of Family Organization*, 20 OKLA. L. REV. 35, 46 (1967).

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> Any dividend received by a shareholder from an electing small business corporation (including any amount treated as a dividend under section 1373(b)) may be apportioned or allocated by the Secretary or his delegate between or among shareholders of such corporation who are members of such shareholder's family (as defined in section 704(e)(3)), if he determines that such apportionment or allocation is necessary in order to reflect the value of services rendered to the corporation by such shareholders.

INT. REV. CODE OF 1954, § 1375(c). Subsection 704(e)(3) defines the family of any individual as "his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons."

[50] 27 CCH Tax Ct. Mem. 155 (1968).

[51] ALA. CODE §§ 47-17-154(1)-(10) (1973).

years, the father received salaries of $4,800 and $7,200, respectively. The remainder of the corporation's earnings and profits were distributed to the shareholders. The Commissioner concluded that neither of the salaries reflected the value of the father's services to the corporation and allocated additional income to the father for the two years in question. The Tax Court upheld the Commissioner's allocation with respect to the $4,800. The court concluded that a yearly salary of $4,800 did not accurately reflect the value of services the taxpayer rendered to the corporation. However, the court found the $7,200 salary reasonable. In valuing the services rendered, the court gave consideration

> to all the facts and circumstances of the business, including managerial responsibilities, and the amount that would ordinarily be paid in order to obtain comparable services from a person not having an interest in the corporation.[52]

The court, in establishing the value of the father's services to the corporation at $7,200 per year, considered the following facts: (1) The newly organized corporation was inexperienced in determining salaries, (2) the taxpayer was technically competent and had previously earned $7,500 per year in a similar position, (3) the taxpayer was the guiding force of the corporation, and (4) there was no specific scheme afoot to avoid taxes.[53] *Krahenbuhl,* although admittedly vague, gives the taxpayer an idea of some of the factors a court will consider in determining the value of the shareholder-employee's services to the corporation.

Krahenbuhl also held that the burden of proof is on the taxpayer to show error in the Commissioner's allocation.[54] Thus, once the Commissioner makes a reallocation, his determination is afforded a presumption of correctness. This procedural advantage could be the tipping factor in many situations.

In *Charles Rocco,*[55] the taxpayers fared better than those in *Krahenbuhl.* A husband and wife were shareholder-employees of a subchapter S corporation. Their children and grandchildren held a majority of the shares. During 1966, the husband and wife received salaries of $15,000 and $12,000, respectively, and dividends of $1,400 and $1,700, respectively. Substantial dividends were distributed to lower tax bracket family shareholders. The Com-

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[52]27 CCH Tax Ct. Mem. at 157. This test was previously promulgated in Treas. Reg. § 1.1375-3(a) (1958). *Cf.* Botany Worsted Mills v. United States, 278 U.S. 282 (1928); 1 CCH 1976 STAND. FED. TAX REP. ¶ 1372.

[53]27 CCH Tax Ct. Mem. at 158.

[54]*Id. See also* Roth Office Equip. Co. v. Gallagher, 172 F.2d 452, 456 (6th Cir. 1949).

[55]57 T.C. 826 (1972).

missioner determined that the salaries to the husband and wife did not reflect the value of their services to the corporation. Consequently, the Commissioner reallocated the dividends. However, the Tax Court reversed the Commissioner's determination. The court followed the traditional standard for determining a "reasonable allowance for salaries or other compensation for personal services actually rendered."[56] The traditional standard for reasonable salary allowances gives consideration to the following factors: (1) The nature of the services performed, (2) the need for any special ability or skill in performing them, (3) the responsibilities involved, and (4) the amount of time required to perform the services.[57] The *Rocco* court noted that the husband and wife each devoted only ten hours per week to the management of the corporation. Their management activities were largely ministerial in character. They took a two and one-half month vacation to Florida during which time a substitute was hired for $2,000. Their accountant testified that for an annual salary of from $4,000 to $6,000, a competent individual not having an interest in the corporation could not be hired to replace either the husband or wife. Thus, the court concluded that the salaries received fairly reflected the value of the services performed.[58]

Even after *Krahenbuhl* and *Rocco,* no definite standard for reasonableness of salary exists. Reasonableness remains a question of fact to be ascertained upon an analysis of the facts of each case.[59] Therefore, a shareholder-employee of a subchapter S corporation desiring to shift income by receiving a low salary should be wary. However, the opportunity for income shifting within the family by this means remains available if kept within reasonable bounds.

The "family" of the shareholder is defined in section 1375(c) by reference to an area of the Code applicable to family partnerships. The shareholder's family to which the reallocation provision of section 1375(c) is applicable includes the spouse, ancestors, and lineal descendants.[60] Commentators have drawn attention to the basic incongruity caused by using the same definition of family for both the subchapter S corporation and the family partnership.[61] Although both the partnership and subchapter S rules were de-

[56] *Id.* at 831. *See* Walter J. Roob, 50 T.C. 891, 898 (1968); INT. REV. CODE OF 1954, § 162(a)(1).

[57] 57 T.C. at 831. *See* Mayson Mfg. Co. v. Commissioner, 178 F.2d 115, 119 (6th Cir. 1949); Dahlem Foundation, Inc., 54 T.C. 1566, 1580 (1970).

[58] 57 T.C. at 833.

[59] *Cf.* Mayson Mfg. Co. v. Commissioner, 178 F.2d 115 (6th Cir. 1949).

[60] INT. REV. CODE OF 1954, §§ 1375(c), 704(e)(3). Subsection 704(e)(3) provides the definition of family of an individual as "only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons."

[61] B. BITTKER & J. EUSTICE ¶ 6.05(2), at 6-20.

signed to prevent intra-family assignment of income,[62] the subchapter S rules are, in some respects, much broader.[63] Unlike the partnership provision, section 1375(c) permits a reallocation to reflect the value of a shareholder's services not only where the other members of his family acquired their stock from him, but also where their stock was acquired from outsiders.[64] For example, the source of the family members' stock is irrelevant to the Commissioner's power to reallocate dividends of a subchapter S corporation.[65] However, only partnership interests which are transferred by gift to members of the transferor's family will invoke the partnership reallocation rules designed to prevent assignment of income.[66] Thus, the subchapter S provision granting the Commissioner power to reallocate dividends is much broader than simlar provisions with respect to family partnerships.[67] Although there is no apparent explanation for this disparate treatment, it remains.

One oddity has escaped the scope of section 1375(c). The section is aimed at the obvious ploy of a father-shareholder working for the corporation at an inadequate salary, thus transferring income via larger dividends to his family members who are shareholders. But what if the father conveys *all* of his stock to his family? Obviously, he is no longer a shareholder. Thus, if his salary does not reflect the value of his services to the corporation, the Commissioner does not have section 1375(c) available for use in reallocating dividends. Any reallocation by the Commissioner would presumably be based on general assignment of income principles.[68]

In summary, a shareholder-employee of a subchapter S corporation can successfully shift income to family members who are also shareholders of the subchapter S corporaton by having the corporation pay him the minimum reasonable salary. This technique leaves more corporate earnings and profits to be distributed as dividends. Successful shifting of income by this device will depend largely upon compliance with section 1375(c). This section gives the Commissioner the power to reallocate dividends among the family members if he determines that the salary paid to the shareholder-employee was unreasonably low. Once a reallocation is made, the burden of proof is on the taxpayer to show that the salary

[62] *Cf.* Beck, *Use of the Family Partnership as an Operating Device—The New Regulations*, 1954 N.Y.U. 12TH INST. ON FED. TAX. 603.

[63] B. BITTKER & J. EUSTICE ¶ 6.05(2), at 6-20.

[64] *Id.*

[65] *Cf.* INT. REV. CODE OF 1954, § 1375(c).

[66] *Id.* § 704(e).

[67] B. BITTKER & J. EUSTICE ¶ 6.05(2), at 6-20.

[68] *Cf.* Lucas v. Earl, 281 U.S. 112 (1940).

was reasonable. The Commissioner's power to reallocate dividends is limited to the shareholder's family. Thus, paying a minimum salary to a shareholder-employee can effectively shift income if kept within reasonable bounds.

C. Conveyance and Leaseback

Perhaps the most common device to shift income within the family unit is the conveyance and leaseback. For example, a 50 percent tax bracket father has income from several sources, one of which is a farm operation that produces taxable income of $30,000 each year. Low tax bracket family members organize a partnership, and the father then conveys the real estate used in the farming operation to the partnership. By a pre-arranged agreement, the father then leases back the property he transferred to the partnership and uses the property in his farming operation. This arrangement has a twofold effect. First, the father is now entitled to a deduction for rental payments made to the corporation for the use of the property.[69] Secondly, the corporation is merely a conduit through which the rental income is passed as dividends to its shareholders, the low tax bracket family members. Consequently, the family unit's aggregate tax liability is reduced. When a father in the 50 percent tax bracket leases back property from such a partnership and pays a $30,000 rental payment to the partnership, the $30,000 is passed through the partnership to family members in the 25 percent tax bracket. By shifting the $30,000 from the father to other family members, the family unit has reduced its tax liability from $15,000 to $7,500—a tax saving of $7,500. Additionally, the father now has a $30,000 deduction for rental expense that he did not have prior to the leaseback. The $30,000 deduction can be used to offset income from other sources. Consequently, the family unit reaps additional tax saving.

In most circumstances, the subchapter S corporation would be ill-suited for the conveyance and leaseback arrangement due to the restrictions placed upon the amount of passive investment income permitted the subchapter S corporation.[70] The subchapter S

[69]The transaction will not be respected for tax purposes if it is a sham and the transferor retains significant control over the transferees. A bona fide transfer and retention of no control by the transferor will, however, bring about the desired results. *See* Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948); Alden B. Oakes, 44 T.C. 524 (1965).

[70]INT. REV. CODE OF 1954, § 1372(e)(5). The subchapter S election is terminated if in any taxable year more than 20 percent of the corporation's gross receipts constitutes "passive investment income." This is defined in subsection 1372(e)(5)(C) to include gross receipts from royalties, rents, dividends, interest, annuities, and gains from the sale or exchange of stock or securities. Under an amendment added in 1966, this limitation does not apply

corporation can receive no more than 20 percent of its gross receipts from passive type investments such as rent. If rental income exceeds the 20 percent limitation, the subchapter S status is automatically terminated.[71] In the normal conveyance and leaseback arrangement, rent would constitute a majority of the income. Consequently, the subchapter S corporation is ill-suited as the conduit corporation. If the conveyance leaseback arrangement is used, the regular corporation, a partnership, or a trust would better facilitate the shifting objective.

PAUL SPILLERS

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so long as the corporation is in either its first or second taxable year of active conduct of business operation and passive investment income is less than $3,000. *Id.* § 1372(e)(5)(B).

[71] *Id.* § 1372(e)(5)(A).

Recent Development

Criminal Procedure — INDIANA POST-CONVICTION REMEDY RULE 1—The failure of a defense attorney to conduct voir dire, make an opening statement, cross-examine the prosecution's witnesses, present defense witnesses, and make a closing statement is not sufficient incompetence for obtaining relief under Post-Conviction Remedy Rule 1, if such failure is due to an attorney's misconception of a single rule of law.—*Bucci v. State*, 332 N.E.2d 94 (Ind. 1975).

The Indiana Supreme Court in *Bucci v. State*[1] may effectively have sounded the death knell to a prisoner's hope of obtaining relief by the use of a post-conviction remedy based on incompetence of counsel. The review mechanisms available through the utilization of a post-conviction remedy exist apart from the normal trial-appeal process. In many cases, as in the instant one, the appellant will have been tried, found guilty, and have appealed to the Indiana Supreme Court, or perhaps to the United States Supreme Court, prior to the initial post-conviction hearing. Further, that hearing could conceivably be appealed through the state and federal court hierarchy. Therefore, to assure an understanding of the development of this case, the bizarre facts surrounding the conviction of Fiore Carl Bucci, Salvator Magnasco, and Richard Viccarone, and the appeal process which followed their conviction will be presented in the order in which they occurred.

In late 1965, the defendants were brought to trial on two separate counts: conspiracy to commit a felony and commiting a felony while armed.[2] Prior to trial, the defendants' attorneys, who were chosen by the defendants and who were reputedly experienced criminal lawyers,[3] had conducted discovery and had persuaded the prosecution to drop two of the four counts then lodged against the defendants.[4] As a part of their "paper war"[5] prior to trial, the de-

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[1]332 N.E.2d 94 (Ind. 1975).

[2]*Id.*

[3]*Id.* at 95. *See* Record, vol. 1, at 436, Bucci v. State, 332 N.E.2d 94 (Ind. 1975) [hereinafter cited as Record].

[4]Brief for Appellants, *passim*, Bucci v. State, 332 N.E.2d 94 (Ind. 1975).

[5]"Paper war" as used in this context refers to the motions, interrogatories,

fendants' attorneys filed a number of motions, including two motions to quash and two motions for change of venue.[6] However, the attorneys failed to perfect either of the two motions for change of venue because they did not timely strike from the panel of judges as required by Supreme Court Rule 1-12.[7] After the time for striking from the panel of judges had run on each motion, the State twice requested and both times obtained resumption of jurisdiction by the original judge.

The trial began shortly after failure of the second change of venue motion and ended two days later. Neither the defendants nor their attorneys participated during this period. The attorneys did not take part in the voir dire, make either an opening or a closing statement, object to any questions asked by the prosecutor or to the answers of the state's witnesses, cross-examine the state's witnesses, or present any evidence. Further, the defendants did not testify.[8] After conviction by the jury, the defendants appealed to the Indiana Supreme Court, alleging that the trial judge's resumption of jurisdiction after defendants' change of venue motions violated the trial rules and case law. The defendants argued that the trial court, when it granted the original change of venue motion, lost all jurisdiction in the subsequent proceedings. Therefore, the court's later resumption of jurisdiction was incorrect. The Indiana Supreme Court, citing numerous cases on point, held that

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and other procedural and discovery tactics used by an attorney prior to trial. *See* Brief for Appellants at 14.

[6] *Id.* at 11-14.

[7] Pre-1971 Supreme Court Rule 1-12, quoted by the court in Bucci v. State, 250 Ind. 670, 671-72, 237 N.E.2d 87, 88 (1968), provided in pertinent part:

> Hereafter whenever in any proceeding, whether civil, statutory or criminal, in any court except the courts of justice of the peace and magistrates, it shall become necessary to select a special judge, the exclusive manner shall be as follows:
>
> . . . .
>
> (3) If neither method provided for by paragraphs (1) or (2) for the selection of a special judge be adopted, then the presiding judge . . . shall submit a list of three (3) persons from which, by striking, an appointee may be selected. In an adversary proceeding each party may strike one (1) name. . . . The moving party shall strike first. . . .
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> . . . .
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> (6) All of the proceedings hereinunder shall be taken expeditiously.
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> . . .
>
> (7) When it becomes necessary to nominate a list under paragraph (3), it shall be the duty of the judge, within three (3) days after his attention has been called to that fact as above provided, to make such nomination and submit the same to the parties in the action, from which the parties within two (2) days thereafter may strike as herein provided.

Rule 1-12 (Supreme Court Rules, 1964).

[8] 250 Ind. at 671-72, 237 N.E.2d at 88.

when a defendant, following a change of venue request, fails to proceed in a timely manner to strike from the panel of judges provided by the court,[9] the original court has the authority to resume jurisdiction.[10]

Five years later, defendants Bucci and Viccarone, alleging incompetency of counsel, filed petitions for post-conviction relief pursuant to Post-Conviction Remedy Rule 1. At the hearing on this petition before the Hendricks County Superior Court, the State argued that the actions of the defendants' attorneys prior to trial demonstrated their competency,[11] and presented evidence tending to establish the strength of the prosecution's case.[12] The prosecutor of the original case testified that the defendants' case had been extremely well defended, considering the evidence against them.[13] The petitioners, Bucci and Viccarone, testified that they had remained mute on instructions of counsel, who had assured them that the trial court did not have jurisdiction and that they would prevail on appeal.[14] The decision of the Indiana Supreme Court on appeal from the conviction and the cases cited therein

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[9]The court stated that "[i]t has been held in Indiana that the time limits contained in Rule 1-12 . . . are mandatory and not merely directive." *Id.* at 672, 237 N.E.2d at 88. *Accord,* State *ex rel.* City of Indianapolis v. Superior Court, 235 Ind. 151, 128 N.E.2d 874 (1955); Trigg v. Criminal Court, 234 Ind. 609, 130 N.E.2d 461 (1955); State *ex rel.* Hosea v. Barger, 231 Ind. 577, 110 N.E.2d 1 (1953). *See also* State *ex rel.* Goins v. Sommer, 239 Ind. 296, 156 N.E.2d 885 (1959).

[10]The *Bucci* court quoted from State *ex rel.* City of Indianapolis v. Superior Court, 235 Ind. 151, 160, 128 N.E.2d 874, 878 (1959).

> "On motion for change of judge the moving party is called upon to strike only once. If a party is sincere in his desire for the appointment of another and unbiased judge, we know of no good reason why he should not personally perform his duty of striking and why he should not do so 'expeditiously' as required by Rule 1-12 or be considered to have waived his right to such change. Furthermore, in the event of the waiver of the right to a change of venue by a moving party *every reason supports the fact that the regular judge should reassume jurisdiction of the matter pending in his court. . . .*"

250 Ind. at 673, 237 N.E.2d at 88 (emphasis supplied by the *Bucci* court).

[11]

> Defense counsel . . . both experienced attorneys in the criminal practice, prior to trial were instrumental in having two (2) of the four (4) charges then against the defendants dropped [Transcript at 437]. Counsel for the defendants conducted normal inquiry into the State's case prior to the trial [Transcript at 433].

Brief for Appellee at 2. However, the transcript of the hearing is less than supportive of the latter statement. The prosecutor, in fact, testified that he did not remember whether the defense attorneys asked for a list of witnesses or conducted any other discovery procedure. He assumed that they must have since this was their regular procedure. Record at 441-43.

[12]332 N.E.2d at 95.

[13]*Id. See also* Brief for Appellee at 2.

[14]Record at 408-10, 423-26.

were presented at the hearing to demonstrate the clear and unambiguous nature of the case law on the jurisdiction question.[15] The Hendricks County Superior Court denied relief to the petitioners on the ground that they had failed to sustain their burden of proof.[16]

On appeal to the Indiana Supreme Court, the petitioners argued alternatively that the facts supported their request for a finding of incompetence of counsel,[17] or for the adoption of a less severe standard for incompetency of counsel. The latter would put Indiana in accord with some recent decisions in the federal courts and a few state courts.[18] The State, in its brief, presented a tripartite argument: First, that the decision appealed from was a "negative judgment";[19] second, that the evidence supported the State's position; and third, that since all of the failures were the result of a tactical plan, they should be treated as strategy,[20] which, according to the Indiana Supreme Court, will not be second guessed.[21]

The supreme court, in a 4-1 decision, affirmed the lower court. However, in reaching this decision, the majority failed to recognize

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[15]*See* note 9 *supra.*

[16]A number of cases have established that the post-conviction remedy is in the nature of a civil action with the petitioner cast in the role of a plaintiff. Therefore, utilizing that analogy, the Indiana courts have held that the petitioner has the burden of proof on the allegation of incompetence of his prior attorney. *See, e.g.*, Hoskins v. State, 302 N.E.2d 499 (Ind. 1973).

[17]Brief for Appellants at 26, 28.

[18]In their brief, appellants cited only Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), but a number of other federal courts and some state courts, California, for example, have adopted this standard. *See* People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963). The specific federal circuits which have adopted the less severe standard are discussed in note 44 *infra.*

[19]The negative judgment or negative verdict approach refers to the situation where the party with the burden of proof on a particular issue lost at the trial court level and appealed from that negative verdict. The Indiana courts have consistently held that the appellant, in such a situation, faces a strong presumption against him. Where the sufficiency of the evidence is questioned on appeal, the court will merely examine the record to determine if there is any evidence, or any legal inference which may be drawn therefrom, which, if believed by the trier of fact, would sustain the verdict or decision. *See, e.g.*, Watson v. Watson, 231 Ind. 385, 108 N.E.2d 893 (1952); Gamble v. Lewis, 227 Ind. 655, 85 N.E.2d 629 (1949). This standard also applies when a post-conviction remedy is used. Hoskins v. State, 302 N.E.2d 499 (Ind. 1973).

[20]It is a general rule of law in Indiana that a court will not look with hindsight at the strategy employed by defense counsel. Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954). This is a fairly common concept throughout the states. *See, e.g.*, Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963); United States v. Cariola, 211 F. Supp. 423 (D.N.J. 1962).

[21]Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954).

the use by appellants of the alternative argument approach.[22] Instead, the court saw appellants as solely advocating the adoption of a new standard, stating that "[t]he Public Defender, who is representing Defendants in this proceeding, appears to realize that this situation does not approach the threshold of ineffective representation as established by our case law."[23] However, the court then went on to discuss, apparently *arguendo*, the degree of competency present in the case.

The court's concurrence with the State's characterization of the trial defense as a tactical plan enabled it to trace all of the defense attorneys' errors to one mistake of law—the belief that failure to timely strike from the panel of judges did not allow the original judge to resume jurisdiction.[24] Having reduced a multitude of errors to one fatal flaw, the court then turned to *Blackburn v. State*,[25] where the supreme court had stated:

> Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience does not necessarily amount to ineffective counsel unless, taken as a whole, the trial was a mockery of justice. A reviewing court ought not to second guess matters of judgment or trial strategy or even mistakes.[26]

The *Bucci* court concluded that this was not a situation which could be described as a "mockery of justice" or "shocking to the conscence of the reviewing court."[27]

The court also discussed appellants' plea for the adoption of a less severe standard concerning incompetency. The majority compared the present Indiana "mockery of justice" standard with the "assistance reasonably likely to render and rendering reasonably effective assistance" standard adopted by the United States Court of Appeals for the Sixth Circuit in *Beasley v. United States*.[28]

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[22]That this was in fact an alternative argument is demonstrated in Appellants' Petition for Rehearing at 2, Bucci v. State, 332 N.E.2d 94 (Ind. 1975) (rehearing denied), where appellants stated:

> The Court apparently misinterprets the alternative arguments made in the Brief of Defendants-Appellants if it means to hold, as the majority opinion in this cause appears to hold, that Appellants did not think and argue that the facts in this case are sufficiently gross to meet the standards of "mockery of justice, shocking to the conscience of the court."

[23]332 N.E.2d at 95.

[24]*Id.* It is interesting to note in this respect that this conclusion of the majority is based solely on allegations made during the hearing which were not supported by evidence and, as the dissent suggests, could as easily have been considered a simple mistake as a tactical maneuver. Record at 400-60.

[25]260 Ind. 5, 291 N.E.2d 686 (1973).

[26]*Id.* at 22, 291 N.E.2d at 691.

[27]332 N.E.2d at 96.

[28]491 F.2d 687 (6th Cir. 1974).

The Indiana Supreme Court rejected the Sixth Circuit standard, stating:

> It is argued that such a standard is "objective" whereas the "mockery" standard is "subjective." The search for objectivity should not obscure common-sense analysis. Indeed, if objectivity is thought to be that which excludes relativity, we can not see that the federal standard is objective. From the point of view of a sensible defendant, any and all assistance of counsel which results in a verdict and sentence more severe than he wishes is *ineffective* assistance. We adhere to the standard consistently followed by our courts for many years.[29]

Finally, the court reviewed the evidence presented at the post-conviction hearing and, after noting appellants' failure to allege or demonstrate that some other tactic would have been more successful, concluded that appellants had not met their burden of proof.

Justice DeBruler, dissenting, argued against the "tactic or strategy" approach followed by the majority. He maintained that the defense attorneys found themselves, through a misapprehension of the law, impaled on the horns of a dilemma—between proceding with the trial and waiving the right to appeal, or saving the right to appeal, by not proceding with the trial, and thus, in effect, denying their clients effective counsel during the trial. Justice DeBruler clearly illustrated that this dilemma did not in fact exist. He cited cases from 1913 to 1973 holding that full participation at trial is not a waiver of the right to appeal the erroneous denial of a motion for a change of venue.[30] He concluded that while the mistake of the defense attorneys may have been on one point of law, when viewed through the eyes of the defendants, they were denied effective counsel.[31]

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[29]332 N.E.2d at 95 (emphasis supplied by the court). Interestingly, the same reasoning could be used to deny the standard which this same court has used for more than 80 years. *See* text accompanying notes 34-36 *infra*.

[30]Millican v. State, 300 N.E.2d 359 (Ind. 1973); Hanrahan v. State, 251 Ind. 325, 241 N.E.2d 143 (1968); State v. Laxton, 242 Ind. 331, 178 N.E.2d 901 (1961); Beck v. State, 241 Ind. 231, 171 N.E.2d 696 (1961); State *ex rel.* Williams Coal Co. v. Duncan, 211 Ind. 203, 6 N.E.2d 342 (1936); Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925); Woodsmall v. State, 181 Ind. 613, 105 N.E. 155 (1913).

[31]

> I can therefore only conclude that the dilemma upon which trial counsel considered themselves impaled in this case was a mere phantom. Their mistake, while only one, and possibly one which arose from a confusion caused by the existence of two judicial procedures for obtaining review of the same type of error, nevertheless, when

While the potential injustice which inheres in this decision is discernible at this point, the full significance and ramifications of the *Bucci* decision can best be seen in a larger perspective. For that reason, the remainder of this discussion will consider two other approaches which the defendants might have pursued, a civil suit for malpractice and a federal action based on the sixth amendment to the United States Constitution, and will compare the incompetency standards applied to these remedies with the post-conviction remedy standard under Rule 1.

Indiana's post-conviction remedies, at least as they are presently constructed, are of fairly recent origin. They were adopted on August 1, 1969, to obviate constitutional deficiencies found to exist in the prior rules.[32] In a decision less than two years after the adoption of the present rules, the Supreme Court of Indiana said:

> In the name of justice and fair play this court, though its promulgation of our post conviction remedy rules and by case decision, has sought to insure that each defendant will have an avenue available by which he may challenge on appeal the correctness of his conviction.[33]

An exploration of the functional reality of these rules, through the mechanism of comparative law, creates some doubt as to the court's determination to effectuate those sentiments, at least where incompetency of counsel is alleged. Compare, for example, the standard used for determining incompetence in criminal cases, with that used for determining incompetence for purposes of malpractice suits. In malpractice, the standard of competence has not changed significantly since 1890. In *Citizens Loan Fund & Savings Association v. Friedley*,[34] the Indiana Supreme Court established the malpractice standard.

> An attorney who undertakes the management of business committed to his charge, thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence ordinarily possessed and employed by well-informed

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properly viewed, not from the standpoint of courts who disdain being tricked or misled, or of counsel who may take offense at being labelled ineffective in the case, but from that of the person accused of crime, needing and choosing to claim that right to effective representation guaranteed by the Constitutions, served to leave appellants without counsel.

332 N.E.2d at 96 (DeBruler, J., dissenting).

[32]*See* Newland v. Lane, 418 F.2d 143 (7th Cir. 1969); Frazier v. Lane, 282 F. Supp. 240 (N.D. Ind. 1968).

[33]Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971).

[34]123 Ind. 143, 23 N.E. 1075 (1890).

> members of his profession, in the conduct of business, such as he has undertaken. *He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law . . . which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession.*[35]

In the *Bucci* case, the attorneys' failure either to know or accept decisions on jurisdiction and waiver which had existed for at least ten years prior to this case would appear to easily bring them within the definition of incompetence established by the Indiana Supreme Court in 1890. In fact the time factor between the release of the publication and the time an attorney is expected to be aware of it is probably much shorter than even *Friedley* suggests. A more recent case stated in dicta that "good appellate advocacy" requires and, further, demands the regular reading of the advance sheets.[36]

While it is true that the instant defendants in a malpractice suit would face additional hurdles[37] in the successful prosecution of their claim, it does seem somewhat odd that they would have much less difficulty establishing the incompetence of their attorneys in a suit for monetary relief than they would have in establishing the same element in a suit for "justice and fair play."[38]

Another interesting comparison, suggested by the appellants in their brief,[39] is that of the definition of "incompetent counsel" as adopted by the Indiana Supreme Court for the purposes of post-conviction relief, and the definitions used by the federal courts to determine the effectiveness of counsel under a sixth amendment challenge. The appellants pointed to one federal criminal case, *Beasley v. United States*,[40] to support their position. In that case, the alleged incompetence of counsel was based on at least seven failures of the defense attorney.[41] All of these, however, were not

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[35]*Id.* at 146, 23 N.E. at 1075 (emphasis added).

[36]Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 408, 266 N.E.2d 810, 811 (1971).

[37]For an excellent discussion of the proof problems in a legal malpractice suit, see Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968). *See generally* Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973); Note, *Attorney's Negligence: The Belated Appeal*, 2 VALP. U.L. REV. 141 (1967).

[38]Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971).

[39]Brief for Appellants at 28-30.

[40]491 F.2d 687 (6th Cir. 1974).

[41]These failures were: (1) Calling a witness whom defendant had stated was out to get him; (2) advising against a jury trial on the basis that the counsel was too ill; (3) never ordering an independent fingerprint test, al-

as totally devastating as the failures in the *Bucci* case since the attorney in *Beasley* did participate to some extent. In rejecting the "farce and mockery" standard which it had applied previously, the Sixth Circuit stated that "[i]t is a denial of the right to the effective assistance of counsel for an attorney to advise his client erroneously on a clear point of law if this advice leads to the deprivation of his client's right to a fair trial."[42] Further, the court went on to hold that the harmless error test does not apply to the deprivation of a procedural right so fundamental as the effective assistance of counsel.[43]

The Sixth Circuit, in reaching these conclusions, pointed to decisions of two other circuits which had previously rejected the "farce and mockery" standard.[44] In referring to these decisions, the *Beasley* court failed to mention that the Third Circuit also had adopted a less stringent test than the "farce and mockery" test.[45] In fact, the Third Circuit has gone even further. In 1970, that court stated:

> While a distinction might be attempted between attacks on state convictions under the Fourteenth Amendment, and those on federal convictions under the Sixth Amendment, we believe the increased recognition of the constitutional right to the assistance of counsel requires that the standard which prevails in federal cases under the Sixth Amendment should be applied equally to state convictions, to which the same guarantee is made applicable by the Fourteenth Amendment under Gideon v. Wainwright. The standard of normal competency applies equally in each case.[46]

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though the trial judge had ordered the government to pay for it; (4) failure to call several res gestae witnesses who would have testified that they could not identify the defendant as the attempted robber; (5) failure to interview any res gestae witness before trial other than one who gave mildly favorable testimony for the prosecution; and (6) conducting no more than a cursory investigation of the facts prior to trial, thus losing the testimony of defendant's alibi witness who died before trial. *Id.* at 690-91.

[42] *Id.* at 696.

[43] *Id.*

[44] West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967). The action of the *Bruce* court is of particular interest because it was the District of Columbia Circuit which established the "mockery and farce" test in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[45] Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

[46] *Id.* at 737 (footnote omitted).

It also appears that the Fourth Circuit has adopted the "reasonably competent" representation standard,[47] and the Eighth Circuit may not be far behind.[48]

From what now appears to be clearly a trend, an illogical dichotomy arises. It appears that defendants, who if originally tried in federal court could obtain relief for incompetency of counsel, will languish in Indiana prisons. The comparisons clearly present a discrepancy in the Indiana judicial system—a discrepancy which favors a defendant's suit to obtain monetary relief over a suit brought to obtain a fair determination of guilt. The federal courts have apparently begun to recognize this discrepancy and are taking steps to alleviate it. The Indiana courts, for whatever reason, do not appear willing to follow. The final determination of the correctness of the Indiana position is up to each reader. The comparison, it seems to this writer, speaks for itself.

DAVID M. HAMACHER

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[47]Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

[48]*See* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

Book Review

CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW. By Curtis R. Reitz.[1] St. Paul: West Publishing Co. 1975. Pp. XXXI, 763. $16.00.

Reviewed by Kurt A. Strasser[2]

Given the number and diversity of teaching materials available for a contracts course, one is inclined to be skeptical whether any new materials in the area are sufficiently unique to justify consideration. Professor Curtis R. Reitz' *Cases and Materials on Contracts as Basic Commercial Law* clearly meets this challenge. The book's purpose, as stated in the Introduction, is to organize the law of contracts by commercial context rather than by legal doctrine (p. XXIII). Thus, after an initial presentation of materials concerning contract "meaning"[3] (pp. 1-153), the materials are organized according to the time of breakdown in the contractual relationship. Problems arising after performance are treated first (pt. II), followed by mid-performance and preperformance problems (pts. III, IV).

In addition to its atypical organization, the book is unique in its nearly complete failure to discuss traditional contract doctrine. There is little treatment of the bases for enforcement of promises generally, or of the reasons for enforcement of some promises and nonenforcement of others. In evaluating the effect of this omission on the book's utility as a teaching tool and as a statement of what the law either is or ought to be, the theses of this reviewer are that contract doctrine is important to an understanding of promise-based liability, and that contract doctrine is essential to the proper functioning, in this society, of contract law as the creator and regulator of promise-based liability. Contract law is primarily the law of the counselor and the planner; it is not merely the law of the advocate. Contract doctrine is, therefore, essential to the predictability required by the counselor or planner. Without this predictability, contract law will be relegated solely

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[2]Assistant Professor of Law, Walter F. George School of Law, Mercer University.

[3]The term "meaning" is used to cover both interpretation and construction (p. 65).

to a curative function, and its vitally important regulatory and dispute prevention functions will not be accomplished.

In keeping with his express purpose of stressing contract context over doctrine, Professor Reitz provides very little treatment of contract doctrine.[4] The only direct discussion of enforceability comes near the end, in Part IV, Section 1 (The Wholly Executory Contract) (pp. 561-628). The presentation suggests that reliance is the primary basis for finding contractual liability in a wholly executory contract. Thus "The Supposed Heresy of Cook v. Oxley"[5] (p. 568) is stressed with *Storch v. Duhnke*[6] (pp. 568-70). Similarly, *Paramount Pictures Distributing Corp. v. Gehring*[7] (pp. 572-81) apparently is disapproved of because it does not make reliance the basis of enforcement. The presentation concludes with a brief textual discussion of the doctrine of consideration (pp. 602-07). Taken as a whole, the section does not give the student sufficient substance or emphasis to discover the bases for enforcement of promises in our theory of contract law.

It is axiomatic that in the American legal system not all promises are enforced and not all promises should be enforced.[8] The reason given most frequently for this principle has been perhaps best stated by Morris Cohen:

> It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.[9]

The problem of deciding which promises to enforce is, presumably, a problem of developed legal systems generally.[10] To decide which

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[4]For purposes of this review, "contract doctrine" means the reasons for enforcement of promises and the requirements for their enforcement. Promissory estoppel and quasi contract will be treated as part of contract doctrine.

[5]100 Eng. Rep. 785 (K.B. 1790).

[6]76 Minn. 521, 79 N.W. 533 (1899).

[7]283 Ill. App. 581 (1936).

[8]Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969); Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 58 (1936); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 942 (1958).

[9]Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1932), in LAW AND SOCIAL ORDER 90 (1933).

[10]For example, this problem is one faced by the French and German civil

promises are to be enforced, one must know the bases for enforcing any promise. For this reason, the budding contracts scholar should first understand the presently articulated bases for enforcing contracts. He may then question whether those bases are correct and whether they are sufficient for the needs of society.[11]

Something more than the bare existence of a promise is required for enforceability.

> To be enforceable, the promise must be accompanied by some other factor. This seems to be true of all systems of law. The question . . . is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?[12]

Most authorities agree that there are three bases for enforcement —three different groups of facts which will make a promise enforceable. First, there is the orthodox but controversial theory of consideration, which focuses on enforcing a promise because the promise was bargained for and given in exchange for another promise or a performance.[13] Second, promises customarily are enforced when there has been justifiable reliance on the promise and "injustice can be avoided only by enforcement of the promise."[14] Recovery is granted in "recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled."[15] Many authorities in the area clearly recognize that enforcement of promises because of detrimental reliance upon them is a basis of promissory liability different from the bargained for exchange doctrine.[16] Professor Reitz seems implicitly to recognize this distinction with his treatment of what is traditionally labeled "promissory estoppel" (pt. IV, § 2). The classic promissory estoppel cases of *Drennan v. Star Paving Co.*[17] (pp. 628-33) and *Goodman v.*

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law systems. Von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1073-74 (1959).

[11]This writer does not mean to suggest that the presently articulated bases for enforcing promises are necessarily correct, nor that the present power of articulation is either correct or accurate. *See* Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938). But the question of basis for enforcement is one which should be presented.

[12]1 A. CORBIN, CORBIN ON CONTRACTS § 110, at 490 (1963).

[13]*See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 75, 76 (Tent. Draft No. 2, 1965); Patterson, *supra* note 8, at 933. As used in this review, "consideration" means bargained for exchange.

[14]RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

[15]Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941).

[16]Farnsworth, *supra* note 8, at 595; Fuller, *supra* note 15, at 819; Fuller & Perdue, *supra* note 8, at 73.

[17]51 Cal. 2d 409, 333 P.2d 757 (1958).

Dicker[18] (pp. 635-37) are treated at some length; the rest of the section then discusses promissory estoppel as a defense to the Statute of Frauds and related matters. This treatment is separate from that which briefly covers consideration. It is submitted that a student cannot understand this treatment of promissory estoppel without having been given a treatment of the traditional consideration doctrine to which it is an exception. Third, promises may be enforced if nonenforcement would result in unjust enrichment; this basis customarily is labeled quasi contract.[19] Professor Reitz does not treat quasi contract as a separate basis for enforcement of promises; this causes the same difficulties as discussed above concerning promissory estoppel.

In fairness it must be pointed out that many of the cases used presume knowledge of consideration theory. For example, in *Fairfield Lease Corp. v. Radio Shack Corp.*[20] (pp. 42-46), the opinion goes beyond the simple knowledge of bargained for exchange theory, used to determine if there was an agreement, to evaluate whether an agent had apparent or implied authority to enter into an agreement. In defense of the book, one must remember that consideration theory is so well accepted that it is rarely litigated except in the truly borderline case. Yet, the theory is important to contract law as a planner's tool even if the theory is not the sanction most often resorted to in contract dispute settlement.

> In short, . . . the area of principal applicability of contract law is one in which the significance of legal sanctions is likely to be comparatively slight, and where, in consequence, disputes are brought before the courts relatively infrequently. This is borne out by the fact that the typical contracts casebook draws heavily upon disputes that arise outside of established markets, such as those that stem from family transactions, and upon those that arise when an established market suffers an abnormal dislocation, such as those that are occasioned by outbreak of war.[21]

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[18]169 F.2d 684 (D.C. Cir. 1948).

[19]*See generally* Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966).

[20]5 Conn. Cir. 460, 256 A.2d 690 (1968). *See also* General Elec. Co. v. United States Dynamics, Inc., 403 F.2d 933 (1st Cir. 1968) (pp. 212-14) (concerning whether agreement was based on prior sample or later express warranty); Hardware Wholesalers, Inc. v. Heath, 10 Ill. App. 3d 337, 293 N.E.2d 721 (1973) (pp. 35-41) (concerning whether an agreement of guaranty existed).

[21]Farnsworth, *supra* note 8, at 605-06. But, as Farnsworth points out, one function of contract law is to decide the difficult disputes.

It is true that values of our society, particularly our commercial society, dictate that most people should be bound by their promises, whether legal liability attaches or not. However, it is submitted that a study of the bases of legal enforcement of promises is essential to an understanding of both when the law will enforce promises and when the law ought to enforce promises. The study of legal sanctions is, in the final analysis, what the law of contracts is all about.

As discussed above, the bases for enforcement of promises in our legal system should be studied directly for an understanding of them. In addition, most of the doctrines of our present-day contract law can best be understood as extensions of or exceptions to contract doctrine. This is illustrated by an examination of the cases and doctrines used by Professor Reitz. In Part I, the "meaning" of contract terms is presented. Section 1 stresses methods of interpretation; Section 2 discusses factors beyond the intention of the parties. It is submitted that students cannot understand the importance of the distinction—that some terms are enforced by courts because the parties have agreed to them, and other terms are simply added by courts as a matter of public policy—without an understanding of the reasons for enforcing the terms agreed upon in the first place.[22] The problem is compounded by the presentation of implied warranties (pt. II, § 1). In *Vlases v. Montgomery Ward & Co.*[23] (pp. 155-61), the student must understand that an implied warranty of quality for 1-day-old chickens exists as an implicit term of the agreement without understanding why the court focuses upon the terms of the agreement. Similarly, in *Webster v. Blue Ship Tea Room, Inc.*[24] (pp. 172-76), one is confronted with the question of what constitutes merchantable quality without a sound theoretical understanding of the court's concern with merchantable quality as a term implicit in the agreement. The same problem exists with the discussions of disclaimers of liability and remedies created by contract.[25] The student has no theoretical background to understand that the public policy

[22]In Stern Enterprises v. Penn State Mut. Ins. Co., 223 Pa. Super. 410, 302 A.2d 511 (1973) (pp. 76-77), the court was concerned with whether to enforce standard form provisions of an insurance contract. Without an understanding that the theoretical basis for enforcing agreements is bargained for exchange, one cannot understand why courts object to enforcing standard form documents which are not truly bargained for.

[23]377 F.2d 846 (3d Cir. 1967).

[24]347 Mass. 421, 198 N.E.2d 309 (1964).

[25]Part II, Section 5B deals with disclaimers of liability which the court will not enforce on policy grounds. That is contrasted with liquidated damages, covered in Section 5C, which the courts will enforce, subject to certain qualifications.

underpinnings of *Henningsen v. Bloomfield Motors, Inc.*[26] (pp. 253-71) provide exceptions to the general rule that parties are permitted to limit their liability by contract, as stated in *Hungerford Construction Co. v. Florida Citrus Exposition, Inc.*[27] (pp. 292-95).

Much the same difficulty exists with the treatment afforded the parol evidence rule and the pre-existing duty rule (pt. 1, § 3). The parol evidence rule is designed to accomplish certain evidentiary functions; the underlying purpose is to bind the parties to the agreement which they made.[28] The cases presented show the willingness of many courts to avoid application of the parol evidence rule when the situation or particular case demands;[29] these numerous exceptions and their apparent inconsistencies can be understood only with the realization that the court is trying to decide what agreement the parties actually made. Similarly, the failure to present reasons for enforcing promises also results in the very brief treatment given the pre-existing duty rule.[30] While the rule is justifiably criticized, it can only be understood as an extension of the doctrine of consideration based on strict logic alone, which does not comport with the policies behind the doctrine.[31]

An understanding of the reasons promises are enforced is important not only to the comprehension of specific doctrines, but

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[26]32 N.J. 358, 161 A.2d 69 (1960).

[27]410 F.2d 1299 (5th Cir.), *cert. denied*, 396 U.S. 928 (1969).

[28]3 A. CORBIN, CORBIN ON CONTRACTS §§ 573, 576 (1960).

[29]*Compare* Universal Film Exchanges, Inc. v. Viking Theater Corp., 400 Pa. 27, 161 A.2d 610 (1960) (pp. 104-10) (upholding the traditional parol evidence rule), *with* Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (pp. 95-99); United States v. Clementon Sewerage Authority, 365 F.2d 609 (3d Cir. 1966) (pp. 111-19); Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 189 A.2d 448 (App. Div. 1963) (pp. 124-34); *and* International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 110 A.2d 186 (1955) (pp. 134-40) (courts were able to circumvent application of the rule).

[30]The only two cases even touching on the rule are Nicolella v. Palmer, 432 Pa. 502, 248 A.2d 20 (1968) (pp. 141-44), and Bollinger v. Central Pa. Quarry Stripping & Constr. Co., 425 Pa. 430, 229 A.2d 741 (1967) (pp. 144-46).

[31]Patterson, *supra* note 8, at 936-38. Professor Patterson does not defend the rule. *See* Brody, *Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENVER L.J. 433 (1975) (arguing that judicial concern with duress is at the heart of the rule and should be articulated as the reason for the decision in those circumstances).

The same problem exists in the treatment of conditions in Part III, Section 1B. Due to the lack of theoretical explanation, the student cannot determine that occurrence of the condition is different from performance of the promise. This is also true in materials dealing with contractual warranty obligations in Part II, Section 3. The real problem in this section is determining what the parties agreed to do. Yet, without the theoretical explanation, one cannot determine why this is important.

also is essential to an understanding of many of the specific cases used throughout the book. In *Stewart v. Newbury*[32] (pp. 385-89), the student must evaluate a negotiated contract to determine whether there was an agreement as to the time of payment, yet he has been given no theoretical basis for an understanding of the importance of an agreement to such a term. *Courtin v. Sharp*[33] (pp. 432-38) deals with the question of whether the risk of loss had passed under pre-Uniform Commercial Code (UCC) law; to understand whether there was an "agreement" as to the risk—the determinative issue—one must have a sufficient background to know what an agreement is and why it is important. Similar problems arise with assignment of contract rights and delegation of contract duties. Cases presented deal with the doctrine that a promise to pay by the assignee is necessary for a novation,[34] and with the question of whether an agreement to accept a substitute promissor can be implied from the facts.[35] A finding of exchanged promises between the two parties is critically important in the cases: it is important to prove an agreement, which is essential to the establishment of contractual liability. However, Professor Reitz neither discusses what an agreement is nor clearly explains its importance—omissions which are likely to interfere with a student's understanding of these cases. The same difficulties are presented in the cases dealing with option contracts,[36] offer and acceptance problems,[37] and pre-contractual liability.[38]

These examples demonstrate that Professor Reitz' presentation implicitly assumes knowledge of the reasons for enforcement of promises generally and for consideration theory specifically. The state of knowledge of contracts students does not justify that assumption. A comprehensive treatment of the law governing legal enforcement of promissory obligations demands direct discussions of the reasons for enforcement and the problems encountered with the traditional reasons. The present bases for promise-based liability are being questioned; they should be discussed directly. This discussion will not be provoked by Professor Reitz'

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[32]220 N.Y. 379, 115 N.E. 984 (1917).

[33]280 F.2d 345 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

[34]Everlasting Memorial Works v. Huyck Memorial Works, 128 Vt. 103, 258 A.2d 845 (1969) (pp. 525-29).

[35]Homer v. Shaw, 212 Mass. 113, 98 N.E. 697 (1912) (pp. 545-46).

[36]People *ex rel.* Dep't of Pub. Works & Bldgs. v. Southeast Nat'l Bank, 131 Ill. App. 2d 238, 266 N.E.2d 778 (1971) (pp. 596-600).

[37]Guerrieri v. Severini, 132 Cal. App. 2d 269, 281 P.2d 879 (1955) (pp. 608-11).

[38]Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (pp. 628-33); American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (S.D.N.Y. 1971) (pp. 645-57).

book. His failure to include materials on the reasons for enforcing promises also deprives the student of this basic doctrine as an organizing principle for all related rules as examples of or exceptions to the doctrine.

One other atypical characteristic of this book is its almost complete disregard of the process of manifestation of assent. Manifestation of assent problems do arise occasionally throughout the book,[39] but the only direct treatment of them (pt. IV, § 1A) focuses on problems of acceptance and revocation crossing the offer. While these certainly are important questions, direct treatment of why manifestation of assent is important and of some of the typical problems of what constitutes manifestation of assent and what is revocation also would be helpful. If one reason for enforcement of a promise is that it was bargained for and given in exchange, some discussion of the bargaining process is necessary. The materials on precontractual liability (pt. IV, § 2) only partially meet this need.

Presumably Professor Reitz does not discuss directly the bases for enforcement of promises because he does not now consider these to be important. Certainly, eminent authority may be cited for the proposition that "what is happening is that 'contract' is being reabsorbed into the main stream of 'tort.'"[40] This "death" of contract is coming about, we are told, through the expansion of concepts of quasi contract and promissory estoppel.

> Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. The dykes which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. With the growth of the ideas of quasi-contract and unjust enrichment, classical consideration theory was breached on the benefit side. With the growth of the promissory estoppel ideal, it was breached on the detriment side. We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a de-

[39] *See, e.g.*, Hardware Wholesalers, Inc. v. Heath, 10 Ill. App. 3d 337, 293 N.E.2d 721 (1973) (pp. 35-41); Wat Henry Pontiac Co. v. Bradley, 202 Okla. 82, 210 P.2d 348 (1949) (pp. 206-11); General Elec. Co. v. United States Dynamics, Inc., 403 F.2d 933 (1st Cir. 1968) (pp. 212-14); The Heron II, [1969] A.C. 350 (pp. 236-44); Keystone Diesel Engine Co. v. Irwin, 411 Pa. 222, 191 A.2d 376 (1960) (pp. 245-47).

[40] G. GILMORE, THE DEATH OF CONTRACT 87 (1974), *reviewed* Gordley, 89 HARV. L. REV. 452 (1975). For an excellent discussion disputing this "death" of contract, see Milhollin, *More on the Death of Contract*, 24 CATH. U.L. REV. 29 (1974). This reviewer assumes that the omission of a discussion of the bases for promise enforcement is caused by Professor Reitz' acceptance of Professor Gilmore's "death" theory.

> fendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed.[41]

To the extent that this theory recognizes the growth of these new doctrines as an expansion of promise-based liability, it is very useful. Enforcement of promises on bases other than the traditional consideration theory has been predicted for some time.[42]

The problem arises when promissory estoppel and quasi contract are not treated as alternative bases of promissory liability but as the sole bases of promissory liability, replacing conventional consideration theory. Even the defenders of consideration have noted that it is not and need not be the sole basis of promissory liability.[43] To recognize the growth of alternative bases is not necessarily to imply either that courts are abrogating traditional consideration doctrine or that they should do so. Clearly, courts do use conventional consideration doctrine in deciding cases.[44] Enforcement of a promise for this reason is different from enforcement based on reliance or unjust enrichment.[45]

Professor Reitz' thesis is that our concern with contract law is as businessman's law. If one accepts this thesis, the primary aim of contract law must be to manage promissory relations of businessmen in order to maximize their legitimate expectations, consistent with other values of this society. Obviously, many businessmen do not plan all their transactions with an eye toward future legal liability;[46] however, many others do consider the legal relationships involved when planning business transactions.[47] These businessmen are entitled to the protections of contract law. In many commercial transactions, predictability, if not certainty, of legal result is necessary and worth the cost.[48] To the extent that

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[41] G. GILMORE, *supra* note 40, at 87-88.

[42] Fuller, *supra* note 15, at 823.

[43] Patterson, *supra* note 8, at 934.

[44] Fuller, *supra* note 15, at 823-24; Patterson, *supra* note 8, at 930.

[45] Patterson, *supra* note 8, at 945. *Cf.* Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 173 (1917).

[46] Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

[47] *Id.* at 60. The fact that any documents, standard form or otherwise, are used indicates some level of planning.

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> In a society like ours, people live not by birds in the hand but by promises . . . . [Ours is a promissory society]. A promissory society, by definition, is one energized and bound together by the institution of contract. That may seem a very remote consideration when you are reading an ordinary contract case, but it is a perspective not to be forgotten altogether when you are trying to arrange the de-

contract law can function as the businessman's and legal planner's law, it must provide the tools for assuring that predictability.[49]

Promises made by parties create an expectation that they will be kept, often called the "expectation interest." When courts enforce promises simply because these were given in exchange for other promises or for performance, they are protecting the expectation interests of the promisee.[50] This protection must be provided or parties would be unable to rely on promises because there would be no predictability of legal result for promise-based commercial transactions. If parties were unable to rely on promises, then contract would not serve as the orderer of future conduct so necessary to the needs of our commercial society.[51] If markets are to exist and complex transactions are to take place, then expectation interests must be protected to encourage reliance.

> In seeking justifications for the rule granting the value of the expectancy there is no need, however, to restrict ourselves by the assumption, hitherto made, that the rule can only be intended to cure or prevent the losses caused by reliance. A justification can be developed from a less negative point of view. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic. Agreements can accomplish little, either for their

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tails of contract law into a form that makes practical working sense. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 47-48 (1975).

[49]As a business planner's law, contract law may be litigated less frequently. Farnsworth, *supra* note 8, at 605. This does not necessarily mean that it does not govern the relations of businessmen; it may mean they do not need a court to tell them the law.

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> That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.

1 A. CORBIN, CORBIN ON CONTRACTS § 1, at 2 (1963). For an expanded discussion of reasons for protecting the expectation interest, see Fuller & Perdue, *supra* note 8, at 57-66.

[51]Patterson, *supra* note 8, at 945. For a brief discussion of the historical origin of the doctrine of consideration and the importance of viewing it in historical context, see Farnsworth, *supra* note 8, at 576-78.

> makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened by any rule which limited legal protection to the reliance interest. Such a rule would in practice tend to discourage reliance. The difficulties in proving reliance and subjecting it to the pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof. For this reason it has been found wise to make recovery on a promise independent of reliance, both in the sense that in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance.[52]

The needs of our commercial society demand, then, that there be a basis of promissory liability which protects the expectation interest and encourages reliance by affording a degree of predictability to the promising parties. Without such a basis for promissory liability, contract law would be useless to the planning businessman or his legal counselor because it would be impossible to plan for a legal result. Contract law which does not make such planning possible will not meet the needs of this society.

This predictability demanded by our commercial society would not be supplied by contract law if promissory estoppel and quasi contract were made the sole bases of promissory liability. When promissory liability is based upon reliance alone, the reliance normally must be foreseeable and justifiable.[53] Promissory estoppel is used to provide flexibility needed in traditional contract law; relief is customarily granted only when injustice can be avoided in no other way.[54] This flexibility is necessary to the proper resolution of many disputes; however, it does not provide the predictability needed in many commercial transactions.[55] The same criti-

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[52]Fuller & Perdue, *supra* note 8, at 61-62. The statement was made in discussing measure of damages; it is equally applicable to the reasons for protecting an expectation interest in the first place.

[53]RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

[54]*Id. See* Patterson, *supra* note 8, at 960-61.

[55]Fuller and Perdue reject reliance as the sole basis of promissory liability.

cism must be made of quasi contract. While both of these theories are useful, and both most certainly have a place in the overall scheme of promise-based liability, these theories do not meet the needs of our commercial society as the sole bases for promissory liability.

Although our present theory of consideration as bargained for exchange is not perfect, it appears to be the best available alternative. If the doctrine of consideration, expressed as bargained for exchange, were abolished, the problems with which it deals still would be present.[56] Professor Patterson, after an extensive study, concluded that "[i]n the United States the bargain test leaves unenforceable very few business agreements that satisfy the other requirements, definiteness of mutual assent and of terms."[57] He points out that "the draftsmen of the *Uniform Commercial Code* not only adopted a definition of contract as a bargain, but also found it necessary to make only a few types of promises enforceable without consideration."[58] This relatively recent reaffirmation of the doctrine, after in-depth study and analysis, supports the conclusion that the present doctrine of consideration serves legitimate purposes and should not be abolished.

This is not to say that the doctrine could not be improved.[59] Even Professor Patterson found it necessary to dispense with "corrolaries which need not be defended"[60] and criticized the doctrine for attempting to cover too many ideas and to accomplish too many basic social policies. While a re-examination of the literature and rules concerning consideration is beyond the scope of this review, a few tentative ideas are offered. First, courts should articulate the purposes behind our requirement of consideration and focus on those purposes to evaluate all existing and future applications of the doctrine.[61] Secondly, courts should focus on the

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They point out that if reliance were the sole basis, the courts would have to make bilateral business agreements an exception. Fuller & Perdue, *supra* note 8, at 70. If this is true, presumably all bilateral agreements would have to be included in the exception. If so, has not the basis of promissory liability changed from reliance to bilateral agreement?

[56]Fuller, *supra* note 15, at 823-24. "As a cornerstone for the law of contract, the doctrine of consideration has been widely criticized, and it would be foolhardy to attempt to defend it through an exercise in logic. It can be understood only in the light of its history and of the society that produced it." Farnsworth, *supra* note 8, at 599.

[57]Patterson, *supra* note 8, at 947.

[58]*Id.*

[59]Promissory estoppel has expanded beyond even the limits discussed by Professor Patterson. *Id.* *See* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

[60]Patterson, *supra* note 8, at 935-41.

[61]For an analysis of the purposes of consideration and its relation to

fact that bargained for exchange either is or ought to be the heart of the present doctrine and should remove rules based solely on ideas of "legal detriment" or "legal benefit."[62] Thirdly, courts should understand that consideration is a label for a finding that, for social policy reasons, bargains of a certain type or made in certain factual contexts ought to be enforced. Courts should then be willing to enforce those bargains demonstrating a need for enforcement, regardless of whether the bargain is of a type or made in a factual context which would have made it enforceable in previous decisions.[63] In short, consideration should be stripped of its magic immunity to analysis and, as with other common law doctrines, should be developed and modified to meet the needs of the society it was developed to serve.

As stated in the Introduction, Professor Reitz' organizational purpose is to present contract rules in their commercial context rather than their doctrinal context. (P. XXIII). In many instances this organization makes the specific contract doctrines much more comprehensible to the student, allowing him to place himself in the position of a contract maker or performer likely confronted with the application of a rule and to better understand what is motivating conduct at a given point in the contractual relation.[64]

The book begins with a discussion of "the meaning" of contracts, which includes construction as well as interpretation. Professor Reitz states his reason in the Introduction:

> First, I believe that the most significant questions in Contracts deal with the meaning of a bargain and the scope of contractual obligations. . . . Thus in Part I, we take up standards and procedures whereby the courts (judges and juries) attempt after-the-fact and in the midst of controversy to decide what the provisions of a contract mean. (P. XXIII).

Part I, Section 1 deals with methods of contract interpretation and construction to ascertain the meaning of the words and conduct of the parties in deciding disputes. Placement of the section early in a contracts course emphasizes that difficulties with contract interpretation usually will arise after the bulk of performance has been rendered and certainly after the contractual rela-

form, see 1 A. CORBIN, CORBIN ON CONTRACTS §§ 109-16 (1963); Fuller, *supra* note 15.

[62]Farnsworth, *supra* note 8, at 598. *See generally* Corbin, *supra* note 45.

[63]*See* 1 A. CORBIN, CORBIN ON CONTRACTS §§ 109-16 (1963). *See also* Fuller, *supra* note 15, at 807 & 823; Patterson, *supra* note 8, at 952-56.

[64]This organization is more useful to the student as future contracts litigator than to the student as future contracts planner. However, it is an aid to planning and, at times, stresses the planning part of transactions.

tionship of the parties has broken down. Contract interpretation is more comprehensible with the realization that it is largely accomplished after-the-fact; the actual intention of contracting parties, often nonexistent on the point in question, is less essential to after-the-fact dispute settlement. One criticism of most contracts courses is the lack of emphasis on draftsmanship; early treatment of this section stresses the need for careful draftsmanship. Early treatment of parol evidence rule problems (pt. I, § 3) also emphasizes that these problems arise only in situations where contractual relations have broken down, usually after most performance has been rendered.[65]

The approach to contracts as basic commercial law is continued by organizing the remaining materials in the book according to time of breakdown of the contractual relationship.[66] This organization clearly helps the student place the contract doctrines discussed in their litigated commercial context. For example, Part II, Sections 1 through 3 treat warranty problems and reinforce the idea that warranty problems typically arise only after some degree of performance. Similarly, Part III, Sections 1 and 2 treat conditions on promises; this organization emphasizes that the happening of conditions is normally a mid-performance contract problem. As a final example, the treatment of anticipatory repudiation and its peculiar damage problems is placed in the section dealing with immediate cancellation.[67] Anticipatory repudiation and mitigation of damages ideas are more easily understood as early performance problems.

A potential problem with this commercial context organization results from the fact that many of the legal doctrines are applicable to performance stages other than those at which they are

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[65]The materials presented do not themselves focus on contract draftsmanship and planning, but they lend themselves very well to this emphasis by the instructor. This organization does exclude treatment of the Statute of Frauds under the section concerned with "The Effect of a Writing." However, there appears to be no serious disadvantage to this arrangement as long as the instructor makes appropriate cross-reference.

[66]

> My second overarching principle of organization of the materials is novel. We will look at contract controversies grouped according to the extent of performance prior to rupture of the relationship. Virtually none of the traditional law of contracts takes cognizance of the performance phase at this point of litigation. (Pp. XXIII-XXIV).

[67]For other examples of how the contextual organization contributes to an understanding of doctrine, see the treatment of "Conduct of the 'Injured' Party" affecting performance as a mid-performance contract problem (pt. III, § 4); "Disruptions Caused by Undermining the Expectations of the Party About to Perform" as a mid-performance contract problem (pt. III, § 7; and assignment of rights and delegation of duties, also as a mid-performance contracts problem (pt. III, § 8).

discussed. Specifically, many of the doctrines are generally applicable across the range of contract problems and, in this organization, the only thing they have in common with the doctrines preceding or following them in the book is the accident of timing of the breakdown of contractual relations. In contract litigation, typically all legal doctrines in support of a party's position are used, not only those which are unique to the stage of breakdown of performance. Thus, problems of consequential damages, although treated as post-performance problems (pt. II, § 4), can arise in breakdowns throughout most stages of the contract relationship. Similarly, the policy restrictions on disclaimers of liability and remedies created by contract, treated as post-performance problems (pt. II, § 5), can arise at any time during performance. Legal problems associated with mistake, anticipatory repudiation, and assignment and delegation are treated as mid-performance problems (pt. III, §§ 6-8). While these problems do most typically arise at this point, they can arise in litigation concerning a breakdown at any performance stage. On balance, the emphasis achieved by Professor Reitz' organization appears to more than outweigh the potential confusion in the student's mind; in any case, the confusion can be cured with appropriate guidance from the instructor.

The mixing of different legal theories and doctrines within the same section of material is a more serious but less frequent problem resulting from the organization. For example, in *Embry v. Hargadine, McKittrick Dry Goods Co.*[68] (pp. 18-23), the court was concerned with whether a contract had been formed. Due to the unusual fact situation, this question arose after partial performance by one of the parties which, presumably, is why the case is placed in the section dealing with contract meaning (pt. I, § 1). However, the case more basically concerns contract formation and should be placed with materials treating that subject; the accident of partial performance should not control placement of a case dealing with a different legal problem. A second example will suffice to make the point. In *Feld v. Henry S. Levy & Sons*[69] (pp. 493-97), the court was concerned with the promise of output implicit in an output contract. The case is placed in a subsection entitled "Announced Change of Mind by One Party: Suspension of Performance and Recovery of Damages by the Other" (pt. III,

[68]127 Mo. App. 383, 105 S.W. 777 (1907). Professor Reitz may seek to use this case as an example of how courts sometimes treat contract interpretation problems as contract formation problems. If this is the point sought to be made, the case should be placed after a systematic treatment of contract formation problems.

[69]45 App. Div. 720, 356 N.Y.S.2d 336 (1974).

§ 7A), which deals primarily with problems of anticipatory repudiation and irregular or late payments on installment contracts.[70] Here again it is demonstrated that the accident of time of breakdown of performance causes a mixing of legal theories and should not be the prevailing organizational principle in this situation. Overall, this problem occurs infrequently[71] and can certainly be corrected or avoided without doing violence to the author's basic organizational scheme.

The book's unique organization has inherent advantages in its use as a teaching tool. These advantages appear to clearly outweigh the disadvantages discussed above. In any event, most of the resulting difficulties can be cured by the instructor. Certainly, this new organizational approach merits serious consideration by contracts teachers.

Professor Reitz' case selection, editing, and case placement within sections is for the most part excellent and contributes to the conclusion that the book is a very good teaching tool. Case placement gives an orderly development to the particular doctrine under consideration. For example, the sequence of cases in Part I, Section 3 present the topic of the effect of the writing on the "meaning" of a contract. After an introductory case dealing with interpretation of a writing, the section proceeds as follows: (1) The modern trend toward restriction of the parol evidence rule is presented in a case interpreting an indemnity provision to be limited to liability of third parties; (2) the traditional parol evidence rule and the policy supporting it are presented; and (3) techniques available for avoiding the application of the parol evidence rule are provided in cases involving interpretation, interpretation in spite of an apparently complete integration and merger clause, and the use of a fraud theory. In the course of development of the section, the Uniform Commercial Code is presented and discussed in the context of the later cases. Finally, this section concludes with a good case on the UCC Statute of Frauds, section 2-201.

[70]The other cases in the section deal with integration, anticipatory repudiation, and payment problems in installment sales.

[71]This writer has found only three other instances in addition to the two cited. First, in Part IV, Section 1B, the last two cases deal with anticipatory repudiation and mitigation of damages while the first case deals with traditional offer and acceptance problems. Second, Part III, Section 3 (Disruptions Nearer the Midpoint in the Performance State) involves problems of payment terms, installment contracts, and the right to an adequate assurance of performance. These problems are treated elsewhere, which indicates that the section is not a useful organizational grouping. Third, in dealing with "The Substantive Content of Conditions" in Part III, Section 2, the materials do not clearly distinguish between performance of the promise and performance of conditions.

A second example, Part III, Section 6, deals with problems of mistake as a change in the perception of the parties. This section begins with the leading case of *Sherwood v. Walker*[72] (pp. 454-60). The cases following discuss the traditional rule requiring mutual mistake, the more modern rule concerning relief for unilateral mistake under certain circumstances, and the concept of risk of mistake presented in *Restatement (Second) of Contracts* section 296. This presentation orients the student to the history and development process of the more modern doctrines, and further, discusses the substance of both the older and more modern doctrines.

Case selection and editing is also very good. The opinions generally discuss reasons for the holdings, rather than simply stating the fact of the holding and reciting "black letter" rules. The editing leaves enough of each opinion in the book to permit the student to grasp the facts of the case and the entire reasoning of the court. Other casebooks, including contracts casebooks, are subject to the justifiable criticism that they only contain squibs of opinions, which makes the learning experience of deducing principles from cases more difficult and much less complete. Professor Reitz' book is a decided improvement over many in this respect.

The book also deals well with the UCC dilemma of the modern contracts course. As a basic part of the first year curriculum, contracts is both a course in common law legal method and a course in substantive law. However, the substantive doctrines that are presented often require some discussion of the UCC to avoid misleading by omission. The dilemma is compounded by the fact that, for the most part, the UCC can better be taught as a unified whole through problems or other non-case-method teaching materials.[73] Professor Reitz' solution to this dilemma is to stay primarily with a case method presentation, and to supplement the cases presented with note material concerning the UCC, using good Code cases where available.[74] Problems requiring analysis of the UCC sections are also used, although less frequently than either cases or note material discussions.[75] While problems are a useful teaching tool for the UCC, it is advisable that their use be limited. The

[72]66 Mich. 568, 33 N.W. 919 (1887).

[73]*E.g.*, J. MURRAY, COMMERCIAL LAW PROBLEMS AND MATERIALS (1975); R. NORDSTROM & N. LATTIN, PROBLEMS AND MATERIALS ON SALES AND SECURED TRANSACTIONS (1968); R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW (1974).

[74]A "good" case is one that either is substantively correct in its application of the Code or is a useful teaching tool due to its misapplication of the Code.

[75]Problems are used throughout the book in the note material following specific cases.

legal method in working directly with the Code to solve problems is different from the common law legal method stressed in first year contracts courses. To the extent that the book is designed primarily for teaching a first year course in contracts, more introduction to specific sections of the UCC is needed in a few places.[76] Of course, introductions can be made by the instructor or through outside reading materials.

In keeping with his purpose of presenting contracts as basic commercial law, Professor Reitz has cured two of the problems that exist with other contracts casebooks. First, he has avoided using as teaching tools obscure cases with atypical and noncommercial fact situations. This contributes to student interest and to the focus of the course on contract as an organizer of commercial relations. Secondly, the book avoids a narrow focus on traditional contract doctrine only and, where necessary, treats the whole legal problem by extending into problems which normally are not classified as contract problems.

This book is a well prepared addition to the existing teaching materials for a first year course in contracts. It presents the material in a comprehensible manner and achieves a workable compromise with the UCC while maintaining a focus on the more traditional common law methodology. Unfortunately, the book does not deal with reasons for enforcement of promises. This omission raises serious questions about its suitability as the sole teaching material for such a course. However, the book should receive serious consideration from the teacher who is willing either to prepare such materials or to use those available from other sources to cover this omission.

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[76]For example, more introduction is needed to presentation of warranty provisions (pt. II, § 1), disclaimer of warranty and the unconscionability provision of the UCC (pt. II, § 5), acceptance and revocation of acceptance (p. 359 *et seq.*), remedy and performance provisions (p. 368 *et seq.*), and whether continued use of consumer goods is wrongful after revocation of acceptance (p. 507 *et seq*).

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Comment

Notes

Recent Development

A corporation operating outside the forum state is liable to the state in which the trial court sits under the forum state's standards for the pollution of interstate waters.—*State ex rel. Scott v. Inland Steel Co.*, 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975).

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